

**IN THE HIGH COURT OF JUDICATURE FOR ORISSA  
AT CUTTACK**

**W.P.(C) No.16174 of 2019**

ASCENOER Lift And Automation  
Private Limited, Bhubaneswar : Petitioner

-Versus-

State of Odisha & another : Opp. Parties

**Advocate(s) who appeared in this case through Video Conferencing mode:-**

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For petitioner :M/s. T.K. Mishra,  
P. Bastia

For Opposite party no.1 : Mr. A.R. Dash, AGA

For Opposite party no.2 : M/s D. Mohapatra,  
M. Mahapatra,  
G.R. Mohapatra, A. Dash,  
M.R. Pradhan, J.M. Barik

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PRESENT:-

**HONOURABLE THE CHIEF JUSTICE MR. MOHAMMAD RAFIQ  
AND  
HONOURABLE MR. JUSTICE BISWANATH RATH**

**JUDGMENT**

**10.12.2020**

**Per:Biswanath Rath, J.**

This Writ Petition is filed seeking a direction from this Court to set aside the order dated 19.08.2019 in cancellation of the tender call notice vide Annexure-4.

**2.** Short background involved in this case is that petitioner being a private company is incorporated under the Companies Act and represented through its Chairman. The O.P.2-the Chief Engineer, Orissa State Housing Board floated the tender call notice at a cost of Rs.1,26,50,000/- for work and supply with installation / testing and commissioning of 8nos. of 6 passenger lift and one number of 8 passenger lift including supply and installation of Servo Stabilizer and Comprehensive Annual Maintenance (CMC) for two years excluding the OEM provided warranty period of lift for the work of multistoried residential apartment (LIG Block) Phase-VII at Dumduma, Bhubaneswar. In the tender call notice eligible criteria of the bidders has been specifically stated in clause-2 and prior to participation in the tender the bidders were advised to verify the spot. Copy of the tender call notice is at Annexure-1. Meeting with the eligible criteria petitioner submitted all required documents before the O.P.2. It is stated that the Tender Committee accepted the proposal submitted by the petitioner. There were 8 agencies who had applied pursuant to the tender call notice and the Tender Committee rejected the proposals of Omega Elevator, Kumar Elevator and M/s. Bharat Elevator as they are not technically qualified on the basis of insufficient experience, but however, selected M/s. Arohi Elevator, M/s. LT Elevator and the petitioner as they were qualified technically and after these parties technically qualified the Tender Committee considered the financial bid. In the financial bid petitioner as well as one Arohi Elevator Private Ltd. quoted their percentage i.e. 14.99 and both of them were selected as L-1. As there were two parties standing at L-1, the Tender Committee entered into a lottery process between Arohi Elevator

and the petitioner and in the process, petitioner became the successful bidder. Pleadings made in this Writ Petition further discloses that in spite of depositing of a sum of Rs.1,26,500/- towards EMD by the petitioner, the O.P.2 did not issue the work order in favour of the petitioner and ultimately the petitioner came to know that the O.P.2 has cancelled the tender notice vide its order dated 19.08.2019 without assigning any reason and also without even communicating the same to the petitioner. It is submitted that petitioner could only get the information about cancellation of the tender notice through the Notice Board of the party concerned.

**3.** Taking this Court to the grounds raised in the Writ Petition, Sri Mishra, learned counsel for petitioner contended that the cancellation decision of the authority is otherwise illegal, arbitrary and contrary to law. It is further contended that for the tender process having been concluded after entering into lottery process and once the petitioner stood at L-1 this is a concluding decision of the authority, it will be amounting to completion of the tender procedure and after which, there is no scope for cancelling the tender process. Further, it is also urged by Sri Mishra that the cancellation notice having not assigned any reason of cancellation the impugned notice vide Annexure-4 is otherwise bad in law. Taking this Court to the heavy investment in participation of the tender process and consumption of time, Sri Mishra, learned counsel for petitioner also contended that after so much development it becomes illegal to go behind such decision that too having no reason for such cancellation and such cancellation order makes huge financial loss to the petitioner. Sri Mishra, learned counsel for petitioner further contended that looking to the

development already taken place upto selection of the petitioner as L-1 and the deposit already made, the authority at least should have given opportunity to the petitioner before issuing such cancellation order. On the basis of development taken place involving the issue involved in the matter, learned counsel for petitioner claimed that petitioner had already got a right involving the work order, which cannot be denied under any circumstance. Taking this Court to the rejoinder affidavit at the instance of the petitioner so also the averments made in I.A. No.15088 of 2019, learned counsel for petitioner giving reference to the provision under the OPWD code contended that after cancellation of the tender call notice, providing such work to Iron Triangles Ltd. is opposed by the provisions made by the State in the matter of contractual workings under the OPWD code and contended that such letter is opposed to their own provision through OPWD code, which has a binding force on all the parties concerned. Further, taking this Court to some contradictions in the counter affidavit learned counsel for petitioner also contended that the opposite parties do not come to the Court with clean hand.

4. Taking this Court to the decision in the case of **Monarch Infrastructure (P.) Ltd. Versus Commissioner, Ulhasnagar Municipal Corporation and others** : 2000(5) SCC 287 and the decision of this Court dated 29.07.2019 involving disposal of the Writ Petition bearing No.11298 of 2018 along with No.11499 of 2018 learned counsel for petitioner claimed that case of the petitioner having support through the aforesaid decisions, the impugned order becomes against law. Sri Mishra, learned counsel for petitioner, in the above circumstances, requested this Court for

setting aside the impugned order and issuing appropriate direction in the matter of issuance of work order in favour of the petitioner.

**5.** In his opposition, taking this Court to the counter affidavit at the instance of O.P.2 Mr. Dayananda Mohapatra, learned counsel for O.P.2 while disputing the claim of the petitioner, contended that though petitioner was successful bidder to supply 8 numbers of 6 passenger lift and one number of 8 passenger lift including supply and installation of Servo Stabilizer and Comprehensive Annual Maintenance (CMC) for two years excluding the OEM provided warranty period of lift for the work of multistoried residential apartment (LIG Block) Phase-VII at Dumduma, Bhubaneswar, but however, keeping in view that the lift is a vital instrument operated in mechanical manner and carries goods and the personnel residing in the building or apartments and for the role of the lift involving such huge construction the authority has given a further thought over the matter and have decided to go for lifts of better brand and therefore, in the process have decided to cancel the tender call notice. Further in the process of cancellation of the tender call notice, the opposite parties have decided to go for fresh tender concerning supply of quality / branded company lift. For a condition being there in the tender notice requiring final approval of the Chairman, it is contended that after finding the petitioner as L-1 the file was processed for approval of the offer of the petitioner to the Chairman and in the process a decision is taken to go for high brand to ensure quality of materials in the matter of putting lifts in the apartments. Referring to the clause 29.1 Mr. D. Mohapatra, learned counsel for O.P.2 contended that the decision of the competent authority is not only in terms of the provision at the clause 29.1 of the tender notice but also based on a decision of the

competent authority to go for high branded lift for installation. Mr. D. Mohapatra, learned counsel contended that looking to the high-rise buildings, taking a decision to cancel the tender process cannot be found to be faulted with, further, since the decision is taken for greater interest of the residents of the high-rise building and the decision of the authority is final, there is little scope of interfering in the matter in exercise of power under Article 226 of the Constitution of India.

Taking this Court to the decisions in the case of **Tata Cellular versus Union of India** : AIR 1996 SUPREME COURT 11 and in the case of **South Delhi Municipal Corporation Versus Ravinder Kumar and another** : (2015) 15 SCC 545, Mr. D. Mohapatra, learned counsel for O.P.2 contended that the decision of O.P.2 has also support of law. Mr. D. Mohapatra, learned counsel for O.P.2 also contended that the law of land further restricts the scope of interfering in such matter in exercise of power under Article 226 of the Constitution of India. In the above pleadings Sri Mohapatra, learned counsel for O.P.2 requested this Court for dismissing the Writ Petition for having no substance.

**6.** Considering the rival contentions of the parties, this Court finds, there is no dispute that the Writ Petition involves a challenge to the cancellation of the tender process through Tender Call Notice bearing No.10/CE/OSHB/2018-19 vide Annexure-4. Looking to the pleadings made in this Writ Petition so also the contentions raised in the rejoinder affidavit involving Annexure-A a subsequent letter issued by the Odisha State Housing Board in allotment of the same work in favour of the Iron Triangle Limited, this Court finds, in para-6 of the counter affidavit at the instance of O.P.2, it is clearly stated that in the meantime offer to the said Farm has already been

cancelled and for the decision of the Board, O.P.2 is to go for fresh tender process. In such situation this Court finds, petitioner's allegation through Annexure-A does not survive. This Court accordingly, proceeds to decide the matter on the basis of the impugned order and the pleadings in the Writ Petition involving the impugned order / action only.

This Court here finds, there is no dispute on the fact that in the tender process many participants were there, there was rejection of some bids at the technical bid process, petitioner along with some other got qualified in the technical bid process. Technically qualified participants including petitioner's case being considered for financial aspect, petitioner and another one found to be L-1 jointly in the price bid. There is also no dispute that upon entering into lottery process the petitioner became the successful tenderer and it is only after petitioner was declared successful in the tender process pursuant to Annexure-1 there appeared no issuance of work order and upon enquiry petitioner came to know about cancellation of the tender call notice through the impugned order vide Annexure-4. Keeping in view the allegation raised by the petitioner and recorded hereinabove, this Court is required to find as to whether the cancellation of tender vide Annexure-4 is valid or invalid? and the consequential relief thereupon.

**7.** This Court here taking into consideration the tender call notice at the instance of O.P.2 vide Annexure-4 finds, the clause 11 at page 11 of the brief contains as follows:

“11. The authority reserves right to cancel any or all bids without assigning any reason.”

Further, looking to the further conditions at page 14 onwards of the brief in the same tender notice at clause 28.2 this Court finds, the same reads as follows:

"28.2 The bidding process shall be deemed to be incomplete till the date of issue of letter of acceptance.  
If the bidder fails to sign the agreement within the stipulated period mentioned under clause 29.2, his bid security shall stand forfeited.

Proviso 29 deals with "Right to accept or reject any or all bids". Clause 29.1 reads as follows:

"29.1 The competent authority on behalf of the Board does not bind him to accept the lowest or any other tender and reserves to him the authority to reject any or all the tenders received without assigning any reason.

Above conditions in the tender call notice reveals that the bidding process remained incomplete till the date of letter of acceptance is issued. Similarly the competent authority on behalf of the Board does not also bind it to accept the lowest or any other tender and reserves to him the authority to reject any or all the tenders received without assigning any reason. From the pleadings available in the Writ Petition this Court finds, there is no pleading that for the tender process involved herein there is issuance of letter of acceptance before the letter of cancellation vide Annexure-4 is issued. Further, looking to the nature of order vide Annexure-4 and the allegation that the impugned order of cancellation did not assign any reason, it appears, for the specific condition at clause 29.1 the authority may not also assign any reason.

Be that as it may, further delving into the matter this Court from paragraph no.3 of the counter affidavit at the instance of O.P.2 finds, keeping in view the fact that installation of the lift in the high rise building is a vital instrument operated in mechanical manner

and it carries goods as well as persons residing in the apartment, the management decided to install the lifts of better brands. Further, in the greater interest of the residents the management in cancellation of the previous tender also decided to go for fresh tender concerning supply of quality materials of branded company having reputation. There is reiteration of such stand again in paragraph no.6 of the counter affidavit at the instance of O.P.2.

It is, in the circumstance, this Court finds, the authority in its wisdom, taking into account the complicated issue involving putting of lifts in the high rise building under its construction, has decided to go for fresh tender to have better brand lifts. Therefore, this Court answers the question framed in favour of O.P.2 thereby declaring that there is no fault in the cancellation of the tender call notice vide Annexure-4 for it being passed in better interest of the residents likely to be accommodated in the high rise building in question. It is, at this stage of the matter, this Court also enters into the question of scope with this Court in interfering in the administrative decision and proceeds accordingly.

Deciding such matters Lord Scarman in Nottinghamshire County Council v. Secretary of State for the Environment, 1986 AC 240 at 251 proclaimed:

“judicial review” is a great weapon in the hands of the Judges; but the Judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficent power.”

Commenting upon the Michael Supperstone and James Goudie in their work on “Judicial Review” (1992 Edition) at page 16 say:

“if anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and therefore to be

treated as an idiosyncratic aberration, it has received the endorsement of the Law Lords generally. The words of Lord Scarman were enchoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the new Zealand Court of Appeal in *Butcher v. Petrocorp Exploration Ltd.* 18 March 1991.”

In *Chief Constable of the North Wales Police v. Evans*, (1982) 3 All ER 141 at 154 Lord Brightman said :

“Judicial Review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC Ord 53 in the following terms:

“This remedy, vastly increased in the extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the Courts as the bodies making the decisions. It is intended to see that the relevant authorities are their powers in a proper manner. (p. 1160)

*R v. Panel on Take-overs and Mergers, ex p Datafin plc.* Sir John Donaldson MR commented : ‘an application for judicial review is not an appeal’. In *Lonrho plc v. Secretary of State for Trade and Industry*. Lord Keith said : ‘Judicial review is a protection and not a weapon’. It is thus different from an appeal. When hearing an

appeal the Court is concerned with the merits of the decision under appeal. In *Re Amin Lord Fraser* observed that :

“Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made ..... Judicial review is entirely different from an ordinary appeal. It is made effective by the Court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.”

Taking into consideration the above broad principles in the matter of judicial review of administrative decision the Hon’ble apex court in ***Tata Cellular v. Union of India*** (supra) in para-85, 90, 93, 94 & 113 has observed as follows:

**“85.** It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

**90.** Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision-making process itself

**93.** The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

**94.** Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.”

**113.** The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

Considering on the aspect of power of Judicial Review by the High Courts, the Hon'ble Apex court in the case of ***Sterling Computers Ltd. versus M/s. M & N Publications Ltd. and others*** and ***United Database (India) Pvt. Ltd. versus M/s. M & N Publications Ltd. and others*** and ***United Periodicals Pvt. Ltd. versus M/s. M & N Publications Ltd. and others*** : AIR 1996 SUPREME COURT 51, has come to observe that High Court cannot seat as Appellate Authority involving terms of contract and its role is confined only to see any infirmity in the decision making process. This judgment, however, held grant in the grab of extension without inviting tender is void.

Similarly, in the case of ***South Delhi Municipal Corporation v. Ravinder Kumar and another***: (2015) 15 SCC 545 the Hon'ble apex Court in para-20 has observed as follows:

**"20.** For the reasons stated above, the High Court has failed to see that the appellant Corporation adopted a fair and transparent method by inviting the bids for the re-tender notice issued by it. The High Court has not found any mala fide intention on the part of the appellant Corporation in inviting the fresh bids after taking the decision to cancel its earlier tender notice. The appellant Corporation, being the custodian of public finance, took its decision objectively with a bona fide intention to serve the best interest of the public in general. Thus, for the foregoing reasons, the appellant Corporation has not committed any wrong in cancelling its earlier tender notice and issuing subsequent tender notice afresh inviting bids from the eligible contractors."

**8.** Considering the factual aspect discussed hereinabove, the development through which a decision is taken by the authority to proceed for fresh tender upon cancellation of the earlier tender process and for the support of law to the case of opposite parties through the decisions cited hereinabove this Court finds, there is no illegality or impropriety on the part of the O.P.2 in cancelling the earlier tender. It is, at this stage of the matter, this Court also records its expectation that for the disclosure in the counter

affidavit at the instance of O.P.2 more particularly through paragraph nos.3 & 6 therein that in cancellation of the previous tender process they are to go for fresh tender process for supply and commissioning of same objects, it will be abided by such commitments.

Before parting with the judgment in upholding the decision of the authority in cancellation of the tender call notice vide Annexure-4, this Court keeping in view that there is some deposit at the instance of petitioner lying with the O.P.2, directs, such deposit shall be refunded to the petitioner with interest @7% per annum allthrough within a period of seven days from the date of communication of a copy of this judgment by either of the parties. This Court here clarifies that for withdrawal of the Annexure-A during pendency of the Writ Petition the interim direction dated 25.11.2019 rendered infructuous and the Opposite Parties will be at liberty to go ahead with their decision on fresh tender.

**9.** The Writ Petition is, accordingly, dismissed with no order as to cost.

**10.** As restrictions are continuing due to COVID-19, learned counsel may utilize the soft copy of this judgment available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

**(Biswanath Rath)**  
**Judge**

**(Mohammad Rafiq)**  
**Chief Justice**