

A BAKSHI SECURITY AND PERSONNEL SERVICES PVT. LTD.

v.

DEVKISHAN COMPUTED PVT. LTD. AND ORS.

(Civil Appeal No. 6978 of 2016)

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JULY 26, 2016

[DIPAK MISRA AND ROHINTON FALI NARIMAN, JJ.]

C *Contract: Tender – Essential conditions – An essential condition of a tender has to be strictly complied with – In the instant case, as per the tender condition, bid below the minimum wage fixed by the government and an open ended offer were liable to be rejected – Respondent no.1 tendered bid of an amount which was way below the minimum wage fixed by the Government – Moreover, offer made by it was not fixed, but open ended – Respondent no.1's bid is liable to be rejected.*

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Writ jurisdiction: Commercial bid – Held: Writ jurisdiction cannot be utilized to make a fresh bargain between parties.

Allowing the appeal, the Court

E **HELD: 1. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format for the price bid provided in Annexure 2 of the tender document. Annexure 2 makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of**
F **salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by**
G **the Government. Secondly, offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same**
H **being liable to be rejected straightaway. Such condition is**

obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender. [Para 13] [318-B-D] A

2. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may have the potential of causing loss to the tenderer is present. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, then the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddled the waters and rendered the price quoted by the bidder as variable and not fixed. [Para 14] [318-E-G] B C D

Poddar Steel Corpn. v. Ganesh Engineering Works
(1991) 3 SCC 273; 1991 (2) SCR 696; *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* (2006) 11 SCC 548; 2006 (8) Suppl. SCR 11 – relied on. E

3. The writ jurisdiction cannot be utilized to make a fresh bargain between parties. The High Court was not correct in treating Respondent No.1's offer as matching with the revised minimum wage calculation, as that would make a new contract between the parties that the parties have not made themselves. [Paras 17, 19] [320-A; F-G] F

General Assurance Society Ltd. v. Chandmull Jain
(1996) 3 SCR 500; *Michigan Rubber (India) Limited v. State of Karnataka and Others* (2012) 8 SCC 216 : 2012 (8) SCR 128 – relied on. G

4. Respondent No.1 has clearly violated the strict terms of the tender condition on every occasion and hence cannot be given relief. And, secondly, due to litigation the present tender has not taken off for over one year. In the absence of malafides, and indeed the High Court judgment has found that malafides did not vitiate the calculation of minimum wage by the Labour H

- A Department, it is not accepted that the figure of Rs.2,91,00,000/- was tailor made to suit the bid offered by the Appellant. [Para 21] [322-F-G]

Case Law Reference

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|---|------------------------|-----------|---------|
| B | 1991 (2) SCR 696 | relied on | Para 15 |
| | 2006 (8) Suppl. SCR 11 | relied on | Para 16 |
| | (1996) 3 SCR 500 | relied on | Para 18 |
| | 2012 (8) SCR 128 | relied on | Para 20 |

- C CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6978 of 2016.

From the Judgment and Order dated 19/22.02.2016 of the High Court of Gujarat at Ahmadabad in Special Civil Application No. 18647 of 2015.

- D H. P. Rawal, Sr. Adv., Anirudh Sharma, Anand Mukharji, Nipun Saxena, Ms. Divya Anand, Advs. for the Appellant.

Shyam Divan, Sr. Adv., Ms. Madhavi Divan, Nikhil Goel, Ms. Naveen Goel, Ashutosh Ghade, Preetesh Kapoor, Ms. Hemantika Wahi, Aagam Kaur, Advs. for the Respondents.

- E The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. Leave granted.

- F 2. On 20.11.2014, the Commissioner of Transport, Government of Gujarat, floated a tender seeking bids for services inter alia of supervisors, computer programmers, data entry operators, and electrician staff at 11 RTO check-posts. A few material clauses of the tender are set out hereinbelow:-

“2.5.5 Commercial

- G The Commercial Bids should strictly conform to the formats provided in Annexure 2 of this tender document.

2.5.6 Fixed Price

- H Prices quoted by the Bidder shall be fixed and no variation will be allowed under any circumstances during the entire period of the project. No open-ended Bid shall be entertained and the same is liable to be rejected straightaway.

2.8.3 Rejection of Bid

The hard-bound copy of Technical Bid Document shall be submitted in the form of printed document. Bids submitted by Telex, fax or email shall not be entertained. Any bid not secured in accordance with Clause 2.8 mentioned above, shall be rejected by COT without any further correspondence, as non-responsive. A bid that does not meet all pre-qualification criteria or is not responsive or not fulfilling technical evaluation shall be rejected by COT, and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation by the Bidder.

3.4.5

It shall be the responsibility of the Bidder to abide by the provisions of the labour welfare legislations, like The Payment of Wages Act, 1936, The Payment of Bonus Act, 1965, The Minimum Wages Act, 1948, The Equal Remuneration Act, 1976, The Payment of Gratuity Act, 1972, The Employees' State Insurance Act, 1948, Contract Labor Act, 1970, The Workmen's Compensation Act, 1923 and other similar legislations, rules, and orders as issued from time to time.

Annexure – 2 (Financial Bid)

Format for Financial Bid

Price Bid: (Financial/Commercial Bid submitted in physical form shall be liable for rejection. It should be submitted online only at <https://www.nprocure.com>)

Please provide price bid for supply of Man Power to be deployed at different Check-posts/CMC.

Sr. No.	Particulars	Qty.	Cost per person per month without tax	Total cost for 24 months without tax
1	Data Entry operator	120		
2	Computer Engineer	02		
3	Electrician	12		
4	Supervisor	12		
	Total			
Additional Service Tax		%		
Grand Total				

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1. Salary paid to the deployed manpower should not be less than the minimum wages published as per the notification issued by state govt. labour department or other statutory benefits applicable. In case of revision of minimum wages/DA by the labour department, agency would be entitled to get the revised rates from Commissioner of transport.

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2. Break-up of salary for each category of employee should be provided indicating clearly the wages, DA, other mandatory statutory benefits & the service charges.

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3. If the component of salary quoted is less than the minimum wages prescribed or the components of mandatory statutory benefits are not included in the break-up, the bid is liable to be rejected.

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4. The quantity of manpower required may vary and the supplier may be asked to supply upto 25% extra manpower at the rate quoted above.

5. L1 will be decided on grand total.

Signature:

Date:

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Designation:

Seal:"

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3. The financial bids were opened on 10.12.2014. 9 bidders gave financial bids of which only three were qualified. The Appellant bid for a total amount of Rs.2,92,93,944/-; Respondent No.1 bid for Rs.2,77,68,000/-, and one Airan Consultants Pvt. Ltd. made a bid for Rs.3,03,83,184/-.

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4. On 26.2.2015, the Technical Evaluation Committee, after taking into account the opinion of the Labour Department, arrived at a minimum wage figure of Rs.3,00,92,346/-. Inasmuch as both the Appellant as well as Respondent No.1 gave bids which were below this figure, (which would, therefore, be less than the amount required as minimum wages, in accordance with the tender conditions read with the Annexure 2 thereof), both the Appellant as well as Respondent No.1 were held to be ineligible. A decision was, therefore, taken to award the tender to the third bidder, namely, M/s Airan Consultants Pvt. Ltd. Respondent No.1 approached the Gujarat High Court in a writ petition challenging the

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aforesaid decision. By its judgment dated 11.8.2015, the High Court ultimately came to the conclusion that the tender in favour of M/s Airan Consultants Pvt. Ltd. ought to be quashed and set aside with the further direction that the Government of Gujarat shall give an opportunity to all three tenderers to resubmit their bids after being appraised of the minimum wage figure given by the Labour Department. This was done as the High Court was of the opinion that all the bidders ought to have been given an opportunity to revise their bills subsequent to the minimum wage calculated by the Labour Department.

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5. In pursuance of the aforesaid judgment, the Transport Department of the Government of Gujarat furnished to all the competing bidders the Labour Department's calculation that minimum wages plus bonus payable for the contract was Rs.3,00,92,346/-.

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6. In response to the above, the Appellant wrote a letter dated 2.11.2015 sticking to the original bid figure of Rs.2,92,93,944/-. On 3.9.2015, Respondent No.1, in response to the minimum wage figure disclosed, wrote to the Government of Gujarat, as follows:-

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“(6.3) Thus, it can be seen that according to the calculation, Minimum Wages and other statutory benefits payable to the employees for 730 days [2 years of contract] comes to Rs.3,00,92,346 [without service tax]. The price at which I am ready to work is Rs.2,77,68,000 [without service tax]. Thus, against payment of wages and all statutory benefits of Rs.3,00,92,346/- and service tax thereon, am ready and willing to accept Rs.2,77,68,000 [plus service tax] from the Government. This would enable the Government to save Rs.23,24,346.00 and service tax thereon, and the ultimate beneficiary would be public exchequer.

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(6.4) I have undertaken in past in writing that I am ready to incur loss as well. The price I have offered shall have no impediment on wages and statutory benefits to be paid to the employees as calculated by the Technical Evaluation Committee based on the report/ opinion of the Labour Commissioner. The tender document itself binds the contractor to abide by all labour welfare legislation, and therefore, there is no question of resiling from performing that part of contract from my end.

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A (6.5) Even in my previous letters also, I have undertaken
that I shall conform to all labour welfare legislations even
after accepting Rs.2,77,68,000 + Service Tax from the
Government. I have also undertaken that I shall bear the
burden of loss incurred on account of the margin between
B my bid and the amount of minimum wages and statutory
benefits payable to my employees. The margin between
the two shall not be hindrance in quality of services I would
offer through my employees on these check-posts.

C (6.6) Without prejudice to above, I am to state that I am
ready to accept even Rs.3,00,92,346.00 + Service Tax, being
the bare minimum wages payable to the employees during
the life of the contract from the Government as calculated
by the Technical Evaluation Committee based on the report
of the Labour Commissioner, such offer will result into 'No
D Profit No Loss' business for me, but at the same time, it
would create a burden of Rs.23,24,346.00 on the State
Funds."

7. On 12.10.2015, the Labour Department gave a second opinion
that though Data Entry Operators are ordinarily to be treated as "skilled
workers", for the purpose of the present tender they should be treated
E as "semi skilled workers". In view of this decision, the Government, on
30.10.2015, arrived at a decision that the actual minimum wage plus
bonus worked out to Rs.2,91,00,000/-, and thus revised their earlier figure
of Rs.3,00,92,346/-. In the judgment under appeal, the High Court has
stated, and it is not controverted before us, that this figure was not
disclosed to either party.

F 8. On 2.11.2015, Respondent No.1 again knocked at the doors of
the High Court in a second writ petition filed by it. By the impugned
judgment dated 22.2.2016, the High Court allowed Respondent no.1's
petition in the following terms:-

G "8. Under the circumstances, the decision of the authorities
to shortlist respondent No.3 for awarding the contract is
set aside. The offer of the petitioner shall be treated as
matching with the revised minimum wage calculation. The
petitioner shall give such offer in clear writing and
undertaking to the authorities latest by 25.2.2016. The
H respondent authorities, unless there is any other

disqualification of the petitioner to carry out the contract,
being the lower, shall accept the same.

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9. Petition is disposed of.”

9. Being aggrieved by the aforesaid judgment, the Appellant is
before us.

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10. Shri Harin Raval, learned senior advocate appearing on behalf
of the Appellant, has pointedly referred to the tender conditions and has
argued before us that Respondent No.1’s writ petition was not at all
maintainable in view of the fact that Respondent No.1 stuck to its earlier
offer of Rs.2,77,68,000/- which was lower than the figure of
Rs.3,00,92,346/- as well as the figure of Rs.2,91,00,000/- fixed by the
Government upon advice given by the Labour Department, of minimum
wage plus bonus. According to him, the without prejudice offer of
Rs.3,00,92,346/- flew in the face of the tender conditions and, therefore,
the writ petition being not maintainable, ought to have been dismissed
both on the ground that the figure quoted by Respondent No.1 was below
the minimum wage fixed as also on the ground that no open ended bid is
liable to be entertained. He further argued that the Court cannot make
a contract between the parties by treating the offer of the Respondent
No.1 as matched with the revised minimum wage calculation. He further
argued that a Mandamus cannot be issued to straightaway award the
tender to a person who does not conform to the essential conditions of
the tender.

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11. Countering these submissions, Shri Shyam Divan, learned senior
counsel appearing on behalf of Respondent No.1, has argued that it is an
admitted fact that the revised figure of minimum wage was never disclosed
to either of the parties and this being so, the judgment under appeal is
correct. He also stated that though the High Court did not find malafides,
yet it went out of its way to comment on the secret manner in which the
Labour Department re-fixed the minimum wage at Rs.2,91,00,000/-,
which is only one lakh above the Appellant’s figure of Rs.2,92,00,000/-
and that, therefore, the said non-transparent process rendered the decision
of the Government to award the tender to the Appellant as bad in law.
He further argued that if the offer of the Respondent No.1 was treated
as matching with the revised minimum wage calculation, the State will
benefit by an amount of Rs.1 lakh and that this was well within the
discretion of the High Court while exercising jurisdiction under Article
226 of the Constitution.

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A 12. Having heard learned counsel for the parties, we agree with Shri Raval's contention that Respondent No.1's bid was contrary to the terms of the tender.

B 13. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.

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F 14. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddled the waters and rendered the price quoted by the bidder as variable and not fixed.

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15. The law is settled that an essential condition of a tender has to be strictly complied with. In **Poddar Steel Corpn. v. Ganesh Engineering Works**, (1991) 3 SCC 273, this Court held as under:-

“... The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases....” [para 6]

16. Similarly in **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.**, (2006) 11 SCC 548, this Court held as under:-

“... (i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when the was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential

A conditions were laid down, the same may not ordinarily be interfered with; ..." [para 66]

17. We also agree with the contention of Shri Raval that **the writ jurisdiction cannot be utilized to make a fresh bargain between parties.**

B 18. In **General Assurance Society Ltd. v. Chandmull Jain**, (1996) 3 SCR 500, this Court, in a slightly different context, stated:

C "In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being."

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G 19. In the light of the aforesaid judgment, the High Court was not correct in treating Respondent No.1's offer as matching with the revised minimum wage calculation, as that would make a new contract between the parties that the parties have not made themselves.

H 20. It is also well to remember the admonition given by this Court in **Michigan Rubber (India) Limited v. State of Karnataka and Others**, (2012) 8 SCC 216 in cases like the present, as under:-

“In **Jagdish Mandal v. State of Orissa**, [(2007) 14 SCC 517], the following conclusion is relevant:

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“22. Judicial review of administrative action is intended 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 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. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

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A Whether the process adopted or decision made is so arbitrary and irrational that the court can say: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached’;

B (ii) Whether public interest is affected.

C If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/ contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”[Para 21]

D 21. We have seen that the present tender has not gotten off the ground since May 2015, and one year’s precious time has been wasted due to litigation between the parties. We must hasten to add that the Government of Gujarat is partly to blame for this inasmuch as it arrived at a minimum wage figure and did not disclose the same to the tendering parties twice. Even in the second round of litigation, the Government did not disclose the newly arrived at minimum wage figure of

E Rs.2,91,00,000/- to the two persons in the fray before us. Ordinarily, therefore, we would have asked the Government to disclose the second figure of minimum wage and restart the tendering process. However,

F we do not think that the justice of the case requires us to do so, for two reasons. First and foremost, Respondent No.1 before us has clearly violated the strict terms of the tender condition on every occasion and hence cannot be given relief. And, secondly, we already find that due to litigation the present tender has not taken off for over one year. In the absence of malafides, and indeed the High Court judgment has found that malafides did not vitiate the calculation of minimum wage by the Labour Department, we cannot accept Shri Divan’s submission that the

G figure of Rs.2,91,00,000/- was tailor made to suit the bid offered by the Appellant herein. We, therefore, set aside the decision of the Gujarat High Court and allow the Government to proceed further in finalizing the tender in favour of the Appellant herein. The appeal is, accordingly, allowed with no order as to costs.