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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on 01st June, 2021

Pronounced on 06th July, 2021

+ W.P.(C) 2869/2021

UNIVABS SLEEPERS PVT LTD

..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Sr. Adv.,
Ms. Radhika Chandrasekhar, Adv.

versus

MINISTRY OF RAILWAY & ORS.

..... Respondents

Through: Mr. Jagjit Singh, Counsel, with Mr.
Preet Singh and Mr. Vipin Chaudhary, Adv. for
R-1/ Railways.

Mr. Ankit Jain, Adv. for R-2

Mr. R.K. Singh, Adv. for R-3.

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+ W.P.(C) 3084/2021

ORISSA CONCRETE AND ALLIED INDUSTRIES LTD

..... Petitioner

Through: Ms. Radhika Chandrasekhar, Adv.

versus

MINISTRY OF RAILWAYS & ORS.

..... Respondents

Through: Mr. Jagjit Singh, Counsel with Mr.
Preet Singh, Mr. Vipin Chaudhary, Adv. for R-1/
Railways.

Mr. Ankit Jain, Adv. for R-2

Mr. R.K. Singh, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

In WP(C) 2869/2021 & 3084/2021 (COMMON GROUNDS):

The present writ petitions have been filed and raise somewhat similar questions and hence are being disposed of by this common Judgment.

- 1) The writ petitions have been filed seeking the following substantive prayers respectively:

Prayer in WP(C) 2869/2021

- a. *Quash/ Direct the Respondent No. 2 to quash the impugned conditions of the tender and result of technical bid which qualify only one Company in the technical bid of the tender for establishing dedicated manufacturing plant nearby project site for East-West Rail Corridor and East Rail Corridor-II of Chhattisgarh Railway Project, for manufacturing, supply and transportation of mono block sleeper as per specification given in Tender No. IRCON/2059/CGRP/e-TENDER/SLEEPERS-CSP/20-21 and petitioner be permitted to submit/ participate its bid without the requirement of establishing dedicated manufacturing plant in the State of Chhattisgarh;*
- b. *Direct the Respondent No. 2 to follow the guidelines/ instruction/ decision of respondent No. 1;*
- c. *Restrain the Respondent No. 2 from opening the financial bid/ awarding contract to only one company till the pendency of the case;*

- d. *If the contract is awarded by Respondent No. 2 then cancel/ quash the same.*
- e. *Ex-parte order in terms of prayer herein above.*

- AND -

Prayer in WP(C) 3084/2021

- a. *Quash/ Direct the respondent No. 2 to quash the impugned conditions of the tender and result of technical bid which qualify only one Company in the technical bid of the tender for establishing dedicated manufacturing plant nearby project site for East-West Rail Corridor and East Rail Corridor-II of Chhattisgarh Railway Project, for manufacturing, supply and transportation of mono block sleeper as per specification given in Tender No. IRCON/2059/CGRP/e-TENDER/SLEEPERS-CSP/20-21 and petitioner be permitted to submit/ participate its bid without the requirement of establishing dedicated manufacturing plant in the State of Chhattisgarh;*
- b. *Direct the Respondent No. 2 to follow the guidelines/ instruction/ decision of Respondent No. 1;*
- c. *Restrain the Respondent No. 2 from opening the financial bid/ awarding contract to only one company till the pendency of the case;*
- d. *If the contract is awarded by Respondent No. 2 then cancel/ quash the same.*

e. Ex-parte order in terms of prayer herein above.

- 2) In WP(C) 2869/2021 and WP(C) 3084/2021, the Petitioners are companies incorporated under the Companies Act, 1956 and are leading rail infrastructure companies, engaged in the business of manufacturing and supplying Pre-Stressed Concrete (PSC) sleepers. The Petitioners have already obtained the Research Design and Standards Organisation (hereinafter referred to as RDSO) approval and are supplying sleepers for last several years.
- 3) The Respondent No.1 in both the petitions is the Union of India, Ministry of Railways.
- 4) Respondent No.2, IRCON International Ltd. is a Government company incorporated by Central Government (Ministry of Railways) under the Companies Act, 1956 and is a leading turnkey construction company in public sector. 86 % of the shares of Respondent No.2 are held by Respondent No.1.
- 5) Respondent No.3 i.e. Chhattisgarh East West Railway Ltd. is a Special Purpose Vehicle (SPV) formed by South Eastern Coalfields Limited, Respondent No.2, and Chhattisgarh State Industrial Development Corporation Ltd. for the purpose of construction of rail lines to evacuate increased quantity of coal from Chhattisgarh and to develop East West Rail Corridor and East Rail Corridor-II. The shareholding pattern of Respondent No. 3 comprises as under:-

“

- a. South Eastern Coalfields Limited - 64%;
- b. Respondent No.2 i.e. IRCON International Ltd. - 26%
- c. Chhattisgarh State Industrial Development Corporation Ltd. - 10%.”

- 6) Respondent No.2 on behalf of the Respondent No. 3 has invited tender for manufacture, supply and transportation of 60 Kg PSC Mono Block Sleepers as per RDSO drg.No.-T-8527 (WB) or as per latest approved drawing with 25 Tonne Axle Load capacity for BG 1676 mm from Dedicated Concrete Sleeper Plant at proposed location or any other location nearby project site for East-West Rail Corridor and East Rail Corridor-II of Chhattisgarh Railway Project in the State of Chhattisgarh.

The relevant portion of tender notice reads as under:-

“

<i>Name of Work</i>	<i>Estimated Cost of Work (including GST)</i>	<i>Eastern Money (In INR)</i>	<i>Completion Period</i>
<i>Manufacturing, Supply and transportation of 60 Kg PSC Mono Block Sleepers as per RDSO drg. No.T-8527 (WB) or as per latest approved drawing with 25 Tonne Axle Load capacity for BG 1676 mm from Dedicated Concrete Sleeper Plant at</i>	<i>190,53,90,820/-</i>	<i>1,01,27,000/-</i>	<i>40 (Forty) Months including monsoon period</i>

<i>proposed location or any other location nearby project site for East-West Rail Corridor and East Rail Corridor-II of Chhattisgarh Railway Project in the State of Chhattisgarh.</i>			
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(Emphasis supplied.)

The Relevant Note attached with the tender along with the Essential Qualifying Criteria, being challenged by the present petition, reads as under:

1. The successful tenderer would set up Concrete Sleeper Plant as per STR (Schedule of Technical Requirement) issued by RDSO. The setup is to be checked and validated by RDSO. After the approval for mass production, is given by RDSO, the production is allowed in the new plant. Thereafter, quality control monitoring & Sleeper testing will be done by 'IRCON or its approval agency [RDSO or M/s RITES] as per procedure stipulated in concrete sleeper specification (IRS-T-39)."

- 7) Originally, Respondent No.2 issued the tender with opening date of 30.04.2019 with a quantity of 5,60,790 number of PSC (Pre-Stressed Concrete) Sleepers.
- 8) In the said tender, there was a provision for bid by a Joint Venture (JV). The said tender, however, was discharged and a new tender was issued with opening date of 27.09.2020, wherein again there was a clear qualifying criteria with regard to number of sleepers

and a provision for bid by a Joint Venture. However, this tender was again discharged. A new tender again was issued on 14.10.2020 with opening date of 10.11.2020 which was postponed several times i.e. on 25.11.2020, 16.12.2020, 30.12.2020, 08.01.2021, 19.01.2021, 22.01.2021 and lastly on 04.02.2021.

- 9) In the third tender, the submission of bid by JV was deleted. A comparative chart showing changes in the tender conditions is as under-

IRCON Tender Open Date 30.04.19	IRCON Tender Open Date 27.09.20	IRCON Tender Open Date 04.02.2021
ANNEXURE – V Essential Qualifying Criteria (Ref. Cl 3.0 of e-Pro Notice Pg 1 & sub – cl 19.1 of ITT) 1. The contractor should possess the experience of having successfully completed similar PSC Sleeper manufacturing & supply contract during the last 7 (seven) years (ending last day of the month previous to the one in which the bids invited) which should be any of the following: i) Three completed PSC Sleeper (25T) manufacturing & supply contract each not less than 1,70,000 Nos. of PSC Sleepers. ii) Two completed PSC Sleeper (25T) manufacturing & supply contract each not less than 2,25,000 Nos. of PSC Sleepers. iii) One completed PSC Sleeper (25T) manufacturing & supply contract each not less than 3,65,000 Nos. of PSC Sleepers. Note: Manufacturers approved by RDSO for Pre-tensioned Pre-stressed Concrete Sleepers are only eligible to participate.	ANNEXURE – V Essential Qualifying Criteria (Ref. Cl 3.0 of e-Pro Notice Pg. 1 & sub-cl. 19.1 of ITT)	ANNEXURE – V Essential Qualifying Criteria Sub cl. 19.1 of ITT) 1. The contractor should possess the experience of having successfully completed similar PSC Sleeper manufacturing & supply contract during the last 7 (seven) years (ending last day of the month previous to the one in which the bids invited) which should be any of the following: i) Three completed PSC Sleeper manufacturing & supply contract each not less than 30% of the estimated cost i.e. 57.16 Crs. ii) Two completed PSC Sleeper manufacturing & supply contract each not less than 40% of the estimated cost i.e. 76.22 Crs. iii) One completed PSC Sleeper manufacturing & supply contract each not less than 65% of the estimated cost i.e. 123.85 Crs. Note: Manufacturers approved by RDSO for Pre-tensioned Pre-stressed Concrete Sleepers are only eligible to

2. The average annual financial turnover during the last 3 years should be at least 30% of the estimated cost. (30%=40Cr.) Notes: The financial turnover shall be judged from ITCC or Annual Reports including Profit and Loss Account. 3. The Contractor should have positive net worth. This will be judged from the audited Balance Sheet of the last financial year ending on a date not prior to 18 months from the date of submission of the tender. 4. The contractor should submit performance certificate in reference to S.No.1 (minimum 3 nos., 2 nos., or 1 no. as the case may be) above issued by Government Organisations/ Semi Government Organisations/ Public	1. 'The average annual Revenue from Operations during the last 3 years should be at least Rs. 57.16 cr. of the estimated cost.' Note: a. The Revenue from Operations shall be judged from Audited P&L Account along with relevant note to accounts. For cross verification, the bidder (Companies registered with ROC only) shall also submit downloaded extracts of 'statement of profit and loss' attached with form AOC-4 filed with ROC form MCA website. Bidders (other than Companies registered with ROC) shall submit the copy of ITR for cross verification. b. The bidder (Companies registered with ROC only) shall submit Form ADT – 1 for past 3 years, whereas other bidders shall submit letter of appointment to auditor. 2. The tendering firm must have satisfactorily completed concreting works/ prestress concreting works of minimum Rs.12.00 crores during any of the preceding three financial years. 3. The 'net worth should be at least 10 % of the estimated cost of work'. Note: The net worth shall be judged from Audited balance sheet of the last financial year ending on a date not prior to 18 months from the date of submission of the tender along with relevant note to accounts. 4. The contractor should submit performance certificates and letter of Award (with BOQ) in reference to S.No.2 above issued by Government Organisations/Semi-Government Organisations/ Public Sector Undertaking/ Autonomous bodies/	participate. 2. 'The average annual revenue from Operations during the last 3 years should be at least Rs. 57.16 Cr. of the estimated cost'. Note: a. The Revenue from Operations shall be judged from Audited P&L Account along with relevant note to accounts. For cross verification, the bidder (Companies registered with ROC only) shall also submit downloaded extracts of 'statement of profit and loss' attached with form AOC-4 filed with ROC form MCA website. Bidders (other than Companies registered with ROC) shall submit the copy of ITR for cross verification. b. The bidder (Companies registered with ROC only) shall submit Form ADT – 1 for past 3 years, whereas other bidders shall submit letter of appointment to auditor. 3. The 'net worth should be at last 10 % of the estimated cost of work'. Note: The net worth shall be judged from Audited balance sheet of the last financial year ending on a date not prior to 18 months from the date of submission of the tender along with relevant note to accounts. 4. The contractor should submit performance certificates and Letter of Award (BOQ) in reference to S.No.1 above issued by Government Organisations/Semi-Government Organisations/Public Sector Undertakings/Autonomous
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Sector Undertakings/ Autonomous bodies/ Municipal bodies/ Public Limited Company/ Concessionaire Company/ Private Company/ JV* Company for having successfully completed similar works in the last 7 years. Certificates issued by the Public Limited Company/ Concessionaire Company/ Private Company/ JV* Company must be supported by Tax Deducted at Source (TDS) certificates in evidence of the value of work executed. 5. The bidder shall sign the Affidavit as enclosed in Annexure-IV of “Instruction to Tenderers”.	Municipal bodies/ Public Limited Company Concessionaire Company/ Private Company/ JV Company or having successfully completed similar works in the last 7 years. Certificates issued by such Public Limited Company/ Concessionaire Company/ Private Company/ JV Company must be supported by Tax Deducted at Source (TDS) Certificates (Form 16A/26AS) in evidence of the value of work executed. Note: 1. The successful tenderer would set up Concrete sleeper Plant as per STR (Scheduled of Technical Requirement) issued by RDSO. The setup is to be checked and validated by RDSO. After the approval for mass production, is given by RDSO, the production is allowed in the new plant. Thereafter, quality control monitoring & Sleeper testing will be done by ‘IRCON or its approved agency [RDSO or M/s RITES] as per procedure stipulated in concrete sleeper specification (IRS-T-39) 2. The bidder shall sign the Affidavit as enclosed in Annexure-IV of “Instructions to Tenderers”.	bodies/Municipal bodies for having successfully completed manufacturing and supplying work in the last 03 years. Note: 1. The successful tenderer would set up Concrete sleeper Plant as per STR (Scheduled of Technical Requirement) issued by RDSO. The setup is to be checked and validated by RDSO. After the approval for mass production, is given by RDSO, the production is allowed in the new plant. Thereafter, quality control monitoring & Sleeper testing will be done by ‘IRCON or its approved agency [RDSO or M/s RITES] as per procedure stipulated in concrete sleeper specification (IRS-T-39) 2. The bidder shall sign the Affidavit as enclosed in Annexure-IV of “Instructions to Tenderers”.
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- 10) The Petitioners in the two writ petitions are aggrieved by the technical qualifying criteria, namely, that the successful tenderer has to manufacture and supply the PSC sleepers by establishing a dedicated concrete sleeper plant at proposed location within the State of Chhattisgarh. The plant has to be set up as per

requirement of RDSO and to be checked and validated by RDSO and RDSO has to give approval for production. The grievance is that they and several others in the business have a combined capacity, which is far in excess of the requirements of not only the tender, but of the overall requirement of PSC sleepers in the State of Chhattisgarh, and the requirement of setting up a new dedicated plant is arbitrary and unreasonable, and would unnecessarily put an additional financial burden on the bidders and raise the cost of production and, consequently, the cost of supply to the Respondents.

- 11) We have heard Mr. Neeraj Kishan Kaul, learned senior counsel with Ms. Radhika Chandrashekhar, counsel for the Petitioner in W.P.(C) 2869/2021, and Ms. Radhika Chandrashekhar, counsel in W.P.(C) 3084/2021, Mr. Jagjeet Singh for Respondent No. 1 and Mr. Ankit Jain for Respondent No. 2.
- 12) Learned Sr. counsel for the Petitioner has argued that the condition of setting up a plant is “unreasonable, arbitrary, malafide, against the doctrine of reasonableness and proportionality”.
- 13) It has been argued that the condition of setting up a dedicated plant will result in elimination of all existing suppliers who have plants in the State of Chhattisgarh from competition for the tender, in spite of surplus capacity, and will cause national loss as the cost of production for supply under the tender would be much higher

than what the Petitioners can offer. It has been argued that there are four RDSO approved manufacturing plants running in the State of Chhattisgarh, and there is already excess/ surplus production and hence, there is no need for establishing a new plant since Respondent No. 2 can get the supplies at a lower price and within a shorter time. The total production capacity of the plants are around 14,46,144 p.a. and the demand is around 7,00,000 for 3 years.

- 14) It has been further argued that an earlier tender issued by Respondent No. 2, the only requirement for the bidder was to submit declaration of spare capacity after meeting the requirement of the Railways, while in the present tender, the said requirement has been done away with and the new requirement is to establish a new plant within the State of Chhattisgarh.
- 15) Learned Sr. Counsel for the Petitioner has further argued that the condition of establishing a new plant is depriving the Petitioners of their fundamental rights guaranteed under Article 14 and 19 of the Constitution of India. The tender conditions are made to suit one particular party, and to procure supplies at a high price from one firm as setting up of a new plant by the Petitioners would require incurring huge costs and expense which tantamount to an unfair trade practice, aimed to eliminate competition.
- 16) The Petitioner has further submitted that on 06.11.2020, the Petitioner raised the same issue in the pre-bid meeting, which was

rejected by the Respondents.

- 17) Learned Sr. counsel for the Petitioner has also taken us through the letter of 28.12.2020 by the Railway Board, Ministry of Railways, Government of India advising Respondent No. 2 that the Policy of Procurement of PSC Mainline Sleepers is under review and Respondent No. 2 should not proceed with any fresh tender, and if there is any urgent requirement of PSC sleeper, the same can be arranged immediately from any of Concrete Sleeper Plants (CSP) of Indian Railway to the projects mentioned above.
- 18) On 28.12.2020, South East Central Railway also sent a letter to Railway Board, and has furnished the list of existing CSPs near the proposed project. The said letter also clearly indicates that the existing suppliers will be able to meet the demand of sleepers of the Respondent No. 2 for Pendra Road to Gevra project for the next 3 or 4 years.
- 19) Mr. Arun Sao, Member of Parliament (M.P.) vide his letter dated 26.12.2020, addressed to the Hon'ble Minister of Railways, has requested that the new tender condition seems to be unfair and malafide, and has requested the Minister to have a look.
- 20) As per the Petitioners, the production capacity of existing manufacturers is 14 lakh sleepers, as against the requirement of 3.2 lakhs sleepers, and the local existing manufacturers will be able to supply the sleepers to the Respondent No. 2 for the next 3 or 4 years. The Respondent No. 2 has totally ignored the advice

and direction of Respondent No. 1 and is proceeding with the tender in total violation of the policy for procurement of concrete sleepers formulated by Respondent No. 1. In fact, as directed by Respondent No. 1, the Respondent No. 2 should follow open tendering system with reverse auction for tender finalization to get the best possible rates.

- 21) The Respondent No. 2 has opened the technical bid on 04.02.2021 and only one company was found technically qualified. The Petitioners have further argued that M/s PCM Strescon Overseas Ventures Limited has already been disqualified by Respondent No. 2 in another tender issued by them being Tender No. IRCON/3018/DFCCIL-CTI2/e-Tender/line Sleepers/08-373 dated 13.02.2021. The said tender incudes a note that states, *“The existing agency, M/s PCM Strescon Overseas Ventures Limited, if participated in the tender, the bid of M/s PCM Strescon Overseas Ventures Limited will be summarily rejected without assigning any reasons.”*
- 22) The Petitioner has further argued that the tender policy should be fair, transparent and equitable which the present tender is not. It has been argued that the Respondent No. 2 has sought to incorporate a condition based upon “bogey of conjectures”, namely, need of dedicated supply, whereas, in the present scenario, there is more than ample supply of sleepers.
- 23) It has been argued that the justification of shortage and uncertainty

for supply is purely conjectural, as all letters mentioned above clearly show that there is enough capacity of sleepers manufacturers available in the State of Chhattisgarh. As of today, against the demand of 3,62,523 number of sleepers, the supply is 14,46,144 number of sleepers leaving a clear balance of 10,83,621 sleepers.

- 24) The Petitioner on our query has also undertaken to file an affidavit indicating that as and when demand will be raised by Respondent No. 2, they will supply the sleepers regardless of the demands placed upon them by the Indian Railways. The actions of the Respondent No. 2 are limiting competition, as there is only one bidder who is technically qualified. It has been argued that the views of Indian Railways cannot be overlooked, even though the views are in the nature of advisories.
- 25) It has been further argued that all the 4 plants in the State of Chhattisgarh are within the vicinity of the development site, and hence, there is no need for setting up a dedicated plant which is a “financially onerous condition”.
- 26) The Petitioner has further argued that the 4 cases, where shortage was alleged, do not belong to South Eastern Railway Zone, but were in the State of Bihar which is under the Eastern Zone. Only one instance of supply of sleepers fell in the State of Chhattisgarh, but that incident is relatable to the year 2017 and not in the current scenario where the Railways have themselves stated that there is

excess of sleepers in the State of Chhattisgarh.

- 27) Learned Sr. Counsel has further taken us through Clause 3.3.6(h) of the Manual of Procurement of Works, 2016, and has also taken us to General Financial Rules (Rule 1, 144, 166, 167 and 173). He submits that the actions of the Respondents are restrictive and the tender is being put at the mercy of a party who has failed in the past.
- 28) Lastly, the learned Sr. Counsel has argued that in pre-contractual matters, the scope of judicial scrutiny by the Court is wider and if restrictions are imposed that are violative of Article 14, tantamount to malpractice, or mala fides, the Court should exercise its discretionary jurisdiction to quash the same.
- 29) Mr. Ankit Jain, learned counsel appeared for Respondent No.2 and has argued that, Respondent No.2 is the tender floating authority for Respondent No.3 which is a SPV. Mr. Jain has argued that even though it is not a defence taken in the Reply, the Petitioner cannot maintain the present petition for the simple reason that the tender was floated on 14.10.2020 initially with the opening date of 10.11.2020. The condition, namely, *“Manufacturing, Supply and transportation of 60kg PSC Mono Block Sleepers as per RDSO drg. No. T-8527(WB) or as per latest approved drawing with 25 Tonne Axle Load capacity for BG 1676 mm from Dedicated Concrete Sleeper Plant at proposed location or any other location nearby project site for East-West Rail Corridor and East*

Rail Corridor-II of Chhattisgarh Railway Project in the State of Chhattisgarh” was known to the Petitioner when the tender was issued. The date of opening of tender floated on 14.10.2020 was extended to 25.11.2020, 16.12.2020, 30.12.2020, 08.01.2021, 19.01.2021, 22.01.2021 and lastly on 04.02.2021 and the Petitioner was aware of the same. The Petitioner attended a pre-bid meeting on 06.11.2020 and duly raised his objection with regard to “*setting up dedicated sleeper plant*” condition.

- 30) The said objection was rejected by Respondent No.2 on 06.11.2020, which again the Petitioner was very well aware of. The Petitioner did not participate in the tender on 04.02.2021, the bids of the tender were opened and the Petitioner has filed the present writ petition on 01.03.2021, after awarding of the tender. In this view of the matter alone, the Respondent argued that the petition is not maintainable and should be dismissed at the outset.
- 31) The counsel for Respondent No.2 has thereafter taken us through various letters exchanged between Respondent No.2 and various authorities, wherein Respondent No.2 clearly highlighted its intention and the need to have a dedicated sleeper manufacturing plant. Respondent No. 2 vide letter dated 30.09.2020, 05.01.2021, 19.01.2021 and 28.01.2021 communicated its stand to the Railway Board. It will be relevant to reproduce the entire set of communication for the sake of clarity.

Letter of Respondent No.2 to the Railway Board dated

30.09.2020:

IRCON INTERNATIONAL LIMITED
(A Govt. of India Undertaking)
An Integrated Engineering and Construction Company

No.IRCON/CGM/CCP/CEWRL/New Sleeper Factory/01/

Dated: 30.09.2020

To

Executive Director, Track (Mod),
Railway Board, Rail Bhawan, New Delhi.

Sub:- Intimation for setting up a dedicated sleeper Plant for Special Purpose Vehicle (SPV).

IRCON is executing the work of construction of Railway Line by forming two SPVs namely Chattisgarh East Rail Limited and Chattisgarh East West Rail Corridor (CERL/CEWRL) under the JV model with share of SECL (64%) : IRCON (36%) : GoCG (10%). Financial closure of CEWRL (Pendra Road to Gevra, 135 Km) has been completed and tenders for Civil works have already been invited.

There is requirement of around 7 lacs PSC Mono Block 60 Kg Sleepers as per RDSO Drg. No.T-8527(WB). As the requirement of sleepers is huge and to be met with in next 3-4 years, IRCON is planning to invite tender for manufacturing and supplying from a dedicated plant by setting it up near the work place. The tentative location of the Plant has been planned as Akaltara, considering the availability of raw materials, etc.

Setting up of this plant by IRCON will help timely completion of CERL/CEWRL project in order to achieve 1 billion ton coal mission target of the Nation.

This is for your information please.

**For & on behalf of
Ircon International Limited**

**(S.L. Gupta)
Director Projects**

Copy to: 1. CMD, IRCON, New Delhi.
2. PED/Infra, Railway Board, New Delhi.

In response to letter by Respondent No.2 dated 30.09.2020, letter sent by the Railway Board to Respondent No. 2 dated 28.12.2020:

**GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)**

No.2018/TK-II/22/11/1/CS-172 Pt.1

New Delhi dt. 28.12.2020

**The Chairman cum Managing Director
IRCON International Limited
Saket District Centre,
Sector 6, C-4, New Delhi – 110017**

Sub: Setting up dedicated Sleeper Plant for SPV of IRCON.

Ref.: IRCON's letter No. IRCON/CGM/CCP/CEWRI/New Sleeper Factory/01 dated 30.09.2020.

In reference to the letter referred, the matter has been considered in Board's office and with the approval of the Competent Authority, IRCON is advised not to proceed with any fresh tender on following ground:-

1. Decision of Ministry of Railways to procure all PSC Mainline Sleeper through GeM only.
2. The policy of procurement of PSC Mainline Sleeper is under review.

It is further advised that any urgent requirement of PSC Mainline sleepers for IRCON projects can be arranged immediately from any of the CSPs of IR near to the projects mentioned in the letter referred above.

**(B.K. Panda)
Dy. Director Track-II
Railway Board**

Copy to: (i) Director (Projects/IRCON with respect to letter No. IRCON/ CGM/ CCP/ CEWRL/ New Sleeper Factory/ 01 dated 30.09.2020.
(ii) General Manager/ SECR for information & necessary action.
(iii) PCE/SECR for information & necessary action.

**(B.K. Panda)
Dy. Director Track-II
Railway Board**

In response to letter of the Railway Board dated 28.12.2020, the letter of Respondent No.2 dated 05.01.2021:

IRCON INTERNATIONAL LIMITED
(A Govt. of India Undertaking)
An Integrated Engineering and Construction Company

No. IRCON/CEWRL/New Sleeper Factory/01

Dated:05.01.2021

To

Member Infrastructure,
Railway Board, Rail Bhawan, New Delhi.

Dear Sir,

Sub;-Intimation for setting up a dedicated sleeper Plant for Special Purpose Vehicle (SPV) – **Chattisgarh East West Railway Limited (CEWRL).**

Ref:- Dy. Director Tr.-II/Railway Board's Letter No. 2018/TK-II/22/11/1/CS-172 Pt.I dated 28.12.20 (**Annex-I**).

- 1.0 In response to letter under reference, it is to clarify that the work is being executed by an SPV [**CEWRL (SECL : 64%, IRCON : 26%, CSIDC : 10%)**] after taking loans etc. from various banks. As per past experience of SPV in CERL (Chattisgarh East Railway Limited), it is seen that adjacent nearby Railway sleeper units did not supply the PSC sleepers for the project, due to which the project got delayed and SPV had to incur a loss of a Rs. 30 Crs (including transport) as sleepers had to be transported from far distance.
- 2.0 Further, IRCON was blamed by Railway Board for being dependent on Railways for material supply. In the year 2018-19 and 2019-20, Railways Board could not supply sleepers to various projects of IRCON. Like Hajipur – Bacwara, Kiul – Gaya Projects. In this regard Railway Board's letter dated 12.12.2018 (**Annex-II**) and 20.02.19 (**Annex-III**) may please be referred, in which IRCON was asked to arrange sleepers of their own.
- 3.0 Even at present, Railway is not able to provide sleepers to IRCON **on assured basis**, as is evident from recent letter from Railways dated 16.09.20 (**Annex-IV**), where it has been stated that “only surplus sleepers to the requirement of Railways” will be allowed to be lifted and Railways will have over-riding priority.
- 4.0 Even DFC is setting up its own sleeper unit to meet their requirement. The practice is running successfully there. IRCON has set up its own dedicated plant for this work.

- 5.0 As suggested in the referred letter, taking sleepers from nearby plants will not be feasible solution. Open tendering would be far better option than taking sleepers from nearby plants who can have cartel formation and enhance the rates unnecessarily. In dedicated Sleeper Plant, the rates will be firmed for the entries duration of the work. As per loan agreement any increase in cost is not funded by banks and is to be borne by promoters only.
- 6.0 Considering the huge requirement of sleepers, it has been decided in consultation with SPV shareholders to have our own dedicated sleeper plant to avoid dependency on existing units, who may not be able to supply when the demand rises in Railways.
- 7.0 In view of above and to avoid any cost/time overturn, IRCON is proceeding with the tender for setting up of Dedicated PRC Sleeper plant to ensure smooth supply of sleeper for CEWRL & CERL-II Projects as the projects are being monitored at the highest level. SPV would not like to take chances to slip in the targets on account of sleepers as it will reduce the IRR of the Projects.

With regards,

Encl: As above.

(S.K. CHAUDHARY)
CHAIRMAN AND MANAGING DIRECTOR

In response to the above letter, response of the Railway Board dated 19.01.2021:

GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)

No.2018/TK-II/22/11/1/CS-172 Pt.1

New Delhi dt. 19.01.2021

The Chairman cum Managing Director
IRCON International Limited
Saket District Centre,
Sector 6, C-4, New Delhi – 110017

Sub: Setting up dedicated Sleeper Plant for SPV of IRCON.

- Ref.: (i) Your letter No. IRCON/CGM/CCP/CEWRI/New Sleeper Factory/01 dated 30.09.2020.
- (ii) SECR letter No. SECR/HQ/Engg/TS/PSC/Planning/ dated 28.12.2020.
- (iii) Your letter No. IRCON/CGM/CCP/CEWRI/New Sleeper Factory/01 dated

05.01.2021.

The position brought out vide your letter at ref. (iii) has been examined in Board's office and following is observed:

- (i) South East Central Railways (SECR) vide letter at ref. (ii) (copy enclosed) has confirmed that the combined production capacity of all the four CSPs of SECR is more than 14 lakh sleeper per annum, whereas the average consumption of sleepers by Open Line and Construction Organisation of SECR is only 3.62 lakh sleepers. Hence, considering the production capacity of CSPs of SECR and requirement of sleepers, it is confirmed that CSPs of SECR will be able to supply sleepers to IRCON for Pendra Road to Gevra Project in next 3-4 years.
- (ii) Regarding chances of cartel formation by existing CSPs as mentioned at Para 5.0 of your letter at ref. (iii), it is suggested to follow the open tendering system with reverse section for tender finalisation, to get the most optimum reasonable rate. Sleepers in the project may even be procured on a landed cost basis giving opportunity to all RDSO approved firms and new plants

Further, Ministry of Railways has already taken a decision to process all Main line sleepers through GEM and accordingly IRCON is advised to take further necessary action.

(B.K. Panda)
Dy. Director Track-II
Railway Board

No.2018/TK-II/22/11/1/CS-172 Pt.1

New Delhi dt. 19.01.2021

Copy to: (ii) General Manager/ SECR for information & necessary action.
(iii) PCE/SECR for information & necessary action.

(B.K. Panda)
Dy. Director Track-II
Railway Board

The letter of Respondent No. 2 dated 19.01.2021:

IRCON INTERNATIONAL LIMITED
(A Govt. of India Undertaking)
An Integrated Engineering and Construction Company

No. IRCON/CGM/CCP/CERL/18/

Dated:19.01.2021

To

Dy. Director Track-II,
Railway Board, New Delhi.

Sub:- Letter of Shri Arun Sao, Hon'ble MP (Lok Sabha) (Bilaspur/Chhattisgarh) regarding lapses in tendering process by IRCON.

Ref:- i. Rly Board letter No. MP/2020/TK-II/22/17/3 CA iii New Delhi dated 12.01.2021.
ii. Hon'ble MP letter No.584 dated 26.12.2020.

CEWRL is an SPV formed amongst SECL, IRCON and Govt. of Chhattisgarh with partnership of 64:26:10. The funding of this project is being done by putting equity by the shareholders and taking loan from the banks.

Therefore, it is an independent project and requiring regular supply of sleepers. Any delay in supply of sleepers will cause heavy losses to the SPV. In the past, it has been seen that Railway is not able to supply sleepers in time and hence, it has been planned by IRCON (executing agency) to set up a dedicated sleeper plant for this project.

Following are the parawise remarks to the points raised by the Hon'ble MP in his letter:

1. There is no question of connivance with some manufacturers of Concrete Sleepers as it is going to be an open tender. Secondly, existing units near the project namely M/s Patil Rail Infrastructure Limited also qualifies.
2. It will not be out of place to mention that different plants are having different capacity of manufacturing concrete sleepers. Small plants will not be able to supply the huge requirement of 07 lacs sleepers for the SPV. Regarding huge loss of public exchequer, the rate reasonableness of sleepers will be scrutinised by a committee after opening of the tender.
3. As per past experience, in spite of assurance been given by railways, shortage of sleepers has been faced by IRCON as the first priority of existing sleeper plant is their own railways works.

Therefore, it will be in the interest of the project that a dedicated sleeper plant is set up.

This letter is issued with the approval of competent authority.

**For & on behalf of
Ircon International Limited**

**(A.K. Goyal)
Executive Director/Projects**

Respondent No.2 sent another letter on 28.01.2021 being response to letters no. No.2018/TK-II/22/11/1/CS-172/Pt.1 and No. 2018/TK-II/22/11/1/CS-

172/Pt.1 dated 28.12.2020 and 19.01.2021 respectively:

IRCON INTERNATIONAL LIMITED
(A Govt. of India Undertaking)
An Integrated Engineering and Construction Company

No. IRCON/CGM/CCP/CERL/18/

Dated:28.01.2021

To

Dy. Director Track-II,
Railway Board, New Delhi.

Sub:-Setting up dedicated Sleeper Plant for SPV of IRCON.

- Ref:- i. Your letter No.2018/TK-II/22/11/1/CS-172/Pt.1 New Delhi dated 19.01.2021.
ii. IRCON letter No: IRCON/CGM/CCP/CEWRL/New Sleeper Factory/01,
dated 05.01.21.
iii. Your letter No. 2018/TK-II/22/11/1/CS-172/Pt.1 New Delhi dated 28.12.2020.

In response to your letter under ref I, IRCON has already made Its position clear to Railway Board, based on its previous experience. It is once again to clarify that CEWRL is a bank-funded project where any delay in execution will cause heavy loss to SPV.

Based on our previous experiences, it is once again to be clarified that

- 1.0 In CERL (Chattisgarh East Railway Limited), adjacent nearby Railway sleeper units could not supply the PSC sleepers for the project, due to which the project got delayed and SPV had to incur a loss of a Rs 30 Crs (including transport) as sleepers had to be transported from far distance.
- 2.0 In spite of assurance been given by railways, shortage of sleepers has been faced by IRCON as the first priority of existing sleeper plant is their own railway works. In the year 2018-19 and 2019-20, Railway could not supply sleepers to various projects of IRCON, like Hajipur - Bacwara, Kiul - Gaya Projects and IRCON was asked to arrange sleepers of their own.
- 3.0 Whenever Railway allots sleeper to IRCON, it is stated in the letter that "only surplus sleepers to the requirement of Railways" will be allowed to be lifted and Railways will have over-riding priority.
- 4.0 As the earning and profit of the SPV depends upon the timely completion of the project, SPV would not like to take chances to slip in the targets on account of sleepers.
- 5.0 It is not a new concept. In the past also, IRCON has set up dedicated sleeper plant for DFC project.

However, para wise remarks to your letter under ref i is furnished below:

1. Remarks covered under item 1.0, 2.0 and 3.0 above.
2. Open tendering system has only been adopted for this work, with Eligibility criteria in line with IRCON's policy to get competitive rates.

Above is Issued with the approval of competent authority.

**For & on behalf of
Ircon International Limited**

**(A.K. Goyal)
ED/ Projects**

32) Additionally, the Respondent No. 2 stated that the Railway Board Policy dated 05.12.2019 for setting up Concrete Sleeper Plant, acknowledged the deficiency in production capacity of sleepers within Railways in many Zonal Railways and framed a New Policy for setting up CSP, to meet the demand and supply of Sleepers by Zonal Railways periodically.

33) Counsel for the Respondent No.2 has sought to justify the condition of setting up of the dedicated plant on the following grounds:

- (a) The project is an independent project of a SPV – not the Railways, and requires regular supply of sleepers. The requirement is substantial i.e. 7 lakh sleepers over a period of 3-4 years.
- (b) The project is being funded by loans taken from the Banks and a time overrun will lead to cost overrun and losses.

- (c) Any delay in supply of sleepers will cause heavy losses to the SPV.
 - (d) In the past, it has been seen that Railways is not able to supply sleepers in time leading to a loss of 30 Cr. and hence, Respondent No.2 (executing agency) has decided to set up a dedicated sleeper plant for this project. This is not a new concept and has been adopted earlier as well.
 - (e) There is no cartelisation or connivance with some manufacturers as it is an open tender.
 - (f) The entire set of correspondence detailed above clearly show the intent of Respondent No. 2 has always been to set up dedicated sleeper plant.
- 34) Learned Counsel for Respondent No.2 submits that the advisories issued by the Ministry of Railways are only advisories, and not binding. The letter dated 28.12.2020 relied upon by the Petitioner is a letter after floating of the tender in question, and only recommends that Respondent No.2 should not proceed with any “fresh tender”. The Ministry of Railways was throughout aware that Respondent No.2 has already issued a tender and the advisory is only against floating of any fresh tender, which, in any event, does not cover the existing tender.
- 35) The supply of requirements of sleepers for SPV is 7 lakh sleepers and small plants would not be able to supply this huge requirement. The reasonableness of rates of sleepers will be scrutinised by a committee after the opening of the tender.
- 36) The Respondent’s past experience shows that despite assurance being

given by Railways, shortage of sleepers has been faced by IRCON, as the first priority of existing sleeper plant is their own Railway zone. The Respondent No. 2 have further in the letter of 28.01.2021 - addressed to the Railway Board, clarified their queries as under:

- “1.0 In CERL (Chattisgarh East Railway Limited), adjacent nearby Railway sleeper units could not supply the PSC sleepers for the project, due to which the project got delayed and SPV had to incur a loss of a Rs 30 Crs (including transport) as sleepers had to be transported from far distance.*
- 2.0 In spite of assurance been given by railways, shortage of sleepers has been faced by IRCON as the first priority of existing sleeper plant is their own railway works. In the year 2018-19 and 2019-20, Railway could not supply sleepers to various projects of IRCON, like Hajipur - Bacwara, Kiul - Gaya Projects and IRCON was asked to arrange sleepers of their own.*
- 3.0 Whenever Railway allots sleeper to IRCON, it is stated in the letter that "only surplus sleepers to the requirement of Railways" will be allowed to be lifted and Railways will have over-riding priority.*
- 4.0 As the earning and profit of the SPV depends upon the timely completion of the project, SPV would not like to take chances to slip in the targets on account of sleepers.*
- 5.0 It is not a new concept. In the past also, IRCON has set up dedicated sleeper plant for DEC project.”*

- 37) Learned counsel for Respondent No.2 has argued that assuming without admitting that there is the policy of Ministry of Railways, Government of India with regard to concrete sleeper plants, and even though it mentions a specific provision for reverse auction, the same

is the policy after the tender in question has already been opened and finalised. Even otherwise, Clause 1.2.2 of the ‘Revised Policy for concrete sleeper plants on Indian Railways’ [No. 2004/TK-ii/22/11/5(Shifting)] dated 19.02.2021, encourages setting up of a new plant.

- 38) Learned counsel for the Respondent No. 2 has further argued that the letter dated 19.02.2021 allows Respondent No. 2 to initiate setting up of new plant without approval from the Railway Board and the counter affidavit of Respondent No.1 categorically states that Respondent No.2 is *“free to decide the mode of procurement of sleepers”* for its projects.
- 39) Lastly, it is the contention of the Respondent No. 2, that the decision to ensure assured supply of sleepers for the above SPV undertaken by IRCON, a committee was constituted by IRCON seeking its recommendation. The committee, on 07.07.2018, duly deliberated upon the earlier essential tender qualifying conditions which read as follows:

“4.1 “The Bidder shall indicate their spare capacity other than the commitment to the Railways so as to meet out the sleeper supply for commissioning the Coal Corridor”

Additional Clause (c)- Bidder should have spare capacity for manufacture and supply of sleepers to meet with the date of completion in the tender. A certificate of commitment to the Railways may please be attached in the Bid. The details of the Bidder of Sleeper manufacturing units shall be submitted in the Format (v).”

- 40) The committee deliberated and found that this Clause was to ensure that sleeper production unit shall have their spare production to supply sleepers within the time line of SPV.

The committee further noted as follows:

“10.0 In order to meet the tough and challenging time line and seeing the present scenario of critical availability of track materials such as sleeper and rails, it is necessary and consider to set up a dedicated plant for supply of the sleepers for the two corridors. This has been reiterated while conducting the review meeting on 28/5/2018 at C.O wherein it was emphasized that "Installation of Sleeper Plant for future requirement of sleepers to reduce unnecessary hurdles from Railways & assured supply as per our requirement on time"

- 41) Learned counsel for Respondent No. 2 has relied upon and taken us through the judgments, namely *Air India v. Cochin International Airport Ltd.*¹, *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation*² and *Directorate of Education v. Educomp Datamatics Ltd.*³
- 42) Hence, it is argued that the decision to set up a dedicated sleeper plant was a considered, deliberated and well-thought of decision by a committee, set up exclusively for this purpose. Respondent No.2 has argued that the scope of judicial scrutiny is very limited in tender matters.
- 43) Learned Sr. counsel for the Petitioner has argued in the rejoinder that

¹ 2000 (2) SCC 617.

² 2000 (5) SCC 287.

the Petitioner is only aggrieved by the “*setting up of a plant*” condition which is an unreasonable condition, and at the stage of pre-contractual obligations, the Courts, while undertaking judicial scrutiny, have wider powers. The scope of judicial review encompasses all such decisions that are arbitrary, discriminatory, malafide or actuated by bias. The decisions are also open to scrutiny on the touchstone of Principles of Natural Justice and Doctrine of Proportionality.

- 44) Learned Sr. counsel has further argued that the Ministry of Railways, Railway Board, the Member of Parliament, all have overwhelmingly impressed that there should be maximum participation of sleeper manufacturers in order to get the best price. He has argued that the Respondent No.2 should have gone for GeM (i.e. Government e-Marketplace), or reverse auction but in effect the condition has only limited the competition to one participant i.e. M/s PCM Strescon Overseas Ventures Limited.
- 45) Ms. Radhika, the Ld. Counsel appearing in WP(C) 3084/2021 has also argued that the land on which the Petitioners plant is situated, does not even belong to the Railways.
- 46) We have also heard Mr. Jagjit Singh, learned Sr. counsel appearing for Respondent No.1. Mr. Singh has argued that the Ministry of Railways on 19.01.2021 has advised the Respondent No.2 to follow open tendering system with reverse auction for tender finalisation to

³ (2004) 4 SCC 19.

get best results. He has further argued that Respondent No.2 was also advised that sleepers for the project may even be procured on a landed cost basis by giving equal opportunity to all the RDSO approved firms and new plants so as to give a fair and equitable treatment to all the prospective bidders.

- 47) He submits that there is a surplus of sleepers in SERC and, at best, the anxiety/ fear of the Respondent No.2 is only conjunctural and a whim as well. The condition is unduly restrictive, unduly disproportionate and the plant of the Petitioner is within 250 KMs of the site. There are other plants which are in the vicinity of 120 to 140 KMs as well.
- 48) However, Respondent No.1 has also stated on affidavit that Respondent No.2 is free to decide the mode of procurement of sleepers for its project.
- 49) We have heard learned counsels for the parties.

DISCUSSION:

- 50) It is an admitted fact that the tender was floated with the condition of *“setting up a dedicated concrete sleeper plant at proposed location or any other location nearby in the State of Chhattisgarh”* on 14.10.2020. The Petitioner was duly aware of the said condition. Thereafter, the Petitioner participated in pre-bid meeting on 06.11.2020 and duly registered its objection which was rejected/ disregarded on the same day. The Petitioner also knew of all the extensions of the tender opening dates, namely, 25.11.2020,

16.12.2020, 30.12.2020, 08.01.2021, 19.01.2021, 22.01.2021 and lastly on 04.02.2021.

- 51) The tender was opened on 04.02.2021, the Petitioner did not participate in the tendering process; and, the present writ petition has been filed on 01.03.2021. There is no explanation for such inaction and delay on the part of the Petitioner. If the Petitioner was aggrieved by the said condition, it should have challenged the said condition at the first given opportunity, and not waited for more than 4 months of knowing the tender condition, and more than 20 days of tender opening. The conduct of the Petitioner shows that it was not genuinely interested in participating in the tendering process. It appears that the intention of the Petitioner was merely to put a spoke in the wheels to somehow prevent the contract being awarded to the eligible and qualified bidder who, possibly, is a competitor. All this the Petitioner has done to serve its own self-centred, narrow-minded interests, even at the cost of obstructing public works. Such conduct of the Petitioner is highly unreasonable.
- 52) In the present case, the Petitioner did not file the petition within reasonable time, and at the appropriate stage and, hence, delay is fatal to the case of the Petitioner.
- 53) We are supported in our view by the judgment of the High Court of Gauhati in *Vilelie Khamo and Sons v. Vikram Infrastructure Co.*⁴, wherein the Court stated the following-

⁴ 2018 SCC OnLine Gau 1519.

30. While exercising jurisdiction under article 226 of the Constitution of India, the court will also have to consider as to whether the petitioner had approached the court with expedition and without any delay. The question of delay has to be considered on the basis of the fact situation in a particular case and there cannot be a straight-jacket formula.....

- 54) In the case, *Veerayee Ammal v. Seenii Ammal*⁵, the Supreme Court had explained “reasonable time” and stated the following-

“13. The word “reasonable” has in law *prima facie* meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word “reasonable”. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the “reasonable time” is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In *P. Ramanatha Aiyar's The Law Lexicon* it is defined to mean:

“A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon

⁵ (2002) 1 SCC 134.

as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

- 55) In *Beg Raj Singh v. State of U.P.*⁶, the Hon'ble Supreme Court had observed the following:

"7....The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created

⁶ (2003) 1 SCC 726

or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him. The present one is such a case. The delay in final decision cannot, in any manner, be attributed to the appellant.”

- 56) In the present case, as stated above, the Petitioner was aware of the “setting up of plant” condition on 14.10.2020. The Petitioner’s objection was rejected on 06.11.2020. The Petitioner, filing the petition on 01.03.2021, when it had been more than 4 months since tender was floated on 14.10.2020, and more than 20 days since bid was opened 04.02.2021, cannot be considered as filed within “reasonable time”. The delay in approaching the courts can be attributed to the Petitioners. The Respondent No. 2 had issued a call for bids and subsequently, selected the bid of M/s PCM Strescon Overseas Ventures Limited. The delay of 20 days cannot be taken lightly and significantly tilts the balance in favour of Respondent No. 2. Hence, the petition is liable to be dismissed on account of delay alone.

- 57) Lest the Petitioner may make a grievance that its submission on merits has not been considered, we also proceed to decide the petition on merit, despite having returned a finding that the petition is liable to be dismissed at the threshold on account of the Petitioner's unreasonable conduct, and delay and laches in preferring the petition.
- 58) The Petitioner had pointed out that M/s PCM Strescon Overseas Ltd. was disqualified in another tender. However, with regard to the separate tender, the entire facts of that tender are not before us and therefore, we cannot make any observation pertaining to that tender.
- 59) In judicial review, the scope of enquiry before the Courts is limited only to see if the tendering process, or any condition imposed by the employer/ tender floating authority is unreasonable, suffers from malafides, arbitrary, whimsical, discriminatory or actuated by bias. The Court is not to sit in the arm chair of the tender floating authority, and decide the requirements of the tender floating authority, or how best they can be achieved.
- 60) Tender floating authority is the master of its conditions and they best know how to achieve the same. In *Air India v. Cochin International Airport Case*, the Hon'ble Supreme Court had observed the following-

*“7.....The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision/ considerations which are paramount are commercial considerations. **The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender***

and that is not open to judicial scrutiny. It can enter into negotiations before finally 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 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 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 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 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.”

- 61) The same has also been observed in the cases, *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation* (quoted above) and *Directorate of Education v. Educomp Datamatics Ltd.*⁷ wherein the court observed-

“11. This principle was again restated by this Court in Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar

⁷ (2004) 4 SCC 19.

Municipal Corpn. [(2000) 5 SCC 287] It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.”

Additionally, the Court held the following in *Directorate of Education v. Educomp Datamatics Ltd.*:

“12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary,

discriminatory or mala fide.”

- 62) The reason for Respondent No.2 setting up a dedicated sleeper plant is found from the notes of the committee, set up exclusively for the purpose, its correspondence and the counter affidavit filed by Respondent No.2. The purpose and intent (as also highlighted in the letter dated 28.01.2021) behind setting up of a dedicated sleeper plant's unit in the vicinity of the site are as under:
- a) In CERL (Chattisgarh East Railway Limited), adjacent nearby Railway sleeper units could not supply the PSC sleepers for the project, due to which the project got delayed and SPV had to incur a loss of a Rs 30 Crs (including transport) as sleepers had to be transported from far distance.
 - b) In spite of assurance been given by railways, shortage of sleepers has been faced by IRCON, as the first priority of existing sleeper plant is their own railway works. In the year 2018-19 and 2019-20, Railway could not supply sleepers to various projects of IRCON, like Hajipur - Bacwara, Kiul - Gaya Projects and IRCON was asked to arrange sleepers of their own.
 - c) Whenever Railway allots sleeper to IRCON, it is stated in the letter that "only surplus sleepers to the requirement of Railways" will be allowed to be lifted and Railways will have over-riding priority.
 - d) As the earning and profit of the SPV depends upon the timely completion of the project, SPV would not like to take chances

to slip in the targets on account of sleepers. The SPV is executing the project by raising loans and can ill afford time or cost overrun.

e) It is not a new concept. In the past also, IRCON has set up dedicated sleeper plant for DEC project.

63) We find the above reasons, more than sufficient for incorporating the Clause of setting up an exclusive tender plant. The argument of the Petitioner that the Respondents should have resorted to GeM, reverse auction does not find favour with us, as it is the tender floating authority who is the best judge of its requirement and the manner in which it proposes to go about making the procurement. It cannot be said that the manner of procurement chalked out by the Respondent No.2 is unreasonable, arbitrary or contrary to public interest. We, in exercise of judicial scrutiny, are not to sit in the arm chair of tender floating authority and super impose the Petitioner's or any outsiders' views over the decisions of the tender floating authority. The tender floating authorities are best suited to decide their requirements and how best to achieve the same.

64) We in exercise of judicial scrutiny, would interfere with administrative policy decisions only if the same are shown to be manifestly arbitrary, discriminatory, malafide or actuated by bias. We are of the firm view that setting up of the exclusive dedicated "sleeper plant" as a tender condition is based on genuine and bonafide concerns of the Respondent No. 2 as there have been shortages of

sleepers in the past. In addition, the decision of setting up a dedicated sleepers plant has been recommended by a committee which was appointed for the sole purpose.

65) Learned counsels for the Petitioners raised four propositions and relied on various judgments to substantiate the same. Following are the propositions and judgments relied upon:

a) Proposition 1: Scope of judicial interference with tender conditions.

i) The Petitioners relied on *Michigan Rubber (India) Ltd. v. State of Karnataka* [(2012) 8 SCC 216, para 23] and quoted the following observation of the Hon'ble Supreme court, "*in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted.*"

ii) Then *ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board*, [(2019) 4 SCC 401. para 15], the Hon'ble Supreme Court had held that, "...even within the contractual sphere, the requirement of Article 14 to act fairly, justly and reasonably by persons who are "State" authorities or instrumentalities continues..."

iii) In *Monarch Infrastructure (P) Ltd. v. Ulhasnagar Municipal*

Corpn. [(2000) 5 SCC 287, para 10] the Supreme Court enunciated the following principle, “(ii) *The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate...*”

iv) Lastly for this proposition, the Petitioner relied on *Tata Cellular v. Union of India* [(1994) 6 SCC 651, para 70], wherein the Court observed the following, “*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 favouritism...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....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.*”

b) Proposition 2: Decision to contract or not to contract is subject to judicial review when the same is taken by State or its instrumentalities; such decision is open to scrutiny on touchstone of Principle of Natural Justice and Doctrine of Proportionality.

i) The Petitioners relied on *Kujla Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL* [(2014)

14 SCC 731, para 17] wherein, the Supreme Court observed the following, *“The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality.”*

- c) Proposition 3: Once State or its instrumentality is a party to a contract it has an obligation to act in a fair, just, reasonable, non-capricious, unbiased manner in terms of Article 14.
- i) The Petitioners relied on the Supreme Court decision in *ABL International Ltd. v. Export Credit Guarantee Corporation of India* [(2004) 3 SCC 553, para 23], wherein the Court observed that, *“It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India.”*
- ii) Then they also have relied on *M.J. Sivani v. State of Karnataka*, [(1995) 6 SCC 289, para 31] wherein the court observed that, *“Fair play and natural justice are part of fair public administration; non-arbitrariness and absence of discrimination are hallmarks for good governance under rule of law.”*

iii) Lastly, in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* [(2012) 10 SCC 1, para 107], the Hon'ble Supreme Court held that, "A State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment."

d) Proposition 4: Jurisdiction under Article 226 is discretionary and can be exercised to reach injustice wherever it is found. For this the Petitioner has relied upon the cases *Secretary, ONGC Ltd. v. V.U. Warrior* [(2005) 5 SCC 245] and *Dwarka Nath v. Income Tax Officer* [(1965) 3 SCR 536].

66) The judgments relied upon by the Petitioner do not persuade us as they are not applicable to the facts of the case before us. We have gone through the judgments cited by the Petitioner. However, the following do not find favour with us nor help the case of the Petitioner for the following distinguishable reasons to the case at hand:

- In *Michigan Rubber (India) Ltd. v. State of Karnataka*, the appellants had moved the court after being aggrieved by a pre-qualification criterion of a tender. In this case, the Supreme Court after noticing all the aspects that went into consideration for formulating the said criterion found no reason to interfere with the pre-qualification criterion. Furthermore, the Court held

the following, “35....As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical....”. In the case before, us, we also have evaluated the reasons for the “setting up of plant” condition and do not find it to be arbitrary, discriminatory, malafide, or actuated by bias.

- In the case, *ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board*, Appellant moved the court against a 10% “deposit-at-call” as a pre-condition for invoking arbitration. The Court while striking down the clause observed “27. *Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10 per cent would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive.*” The principle applied to the factual scenario of the case are clearly distinguishable from the case at hand. Arbitration is an important alternative dispute resolution process which is to be encouraged and not discouraged, and any unfair clause discouraging the same would be against public interest. The reasoning provided by the defendant, that is to prevent frivolous invocation of arbitration wasn’t sufficient as it acted as a deterrent to arbitration.

- In *Monarch Infrastructure (P) Ltd. v. Ulhasnagar Municipal Corpn.* case, the Commissioner had waived the requirement of clause 6(a) of the tender. This deletion of clause took place after some offers had been received based on clause 6(a). The High Court asked the Municipal Corporation to carry out the process afresh so that everyone has the benefit of clause 6(a) being deleted, ensuring fairness and equal treatment. The Supreme Court upheld the order of the High Court and while doing so observed the following, “*We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge. We do not think that we should intercede to restore status quo ante the conditions arising in clauses 6(a) and 6(b)*”. The Court observed that the authority calling for the tender is the best judge of the tender conditions. Additionally, the Court agreed with the High Court’s view, “*The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible.*”
- In *Tata Cellular v. Union of India*, the Supreme Court only interfered with the decision of the tendering authority when the decision was arbitrary and violative of principles of natural justice. They also exercised judicial restraint as they asked the tendering authority to “set right the decision-making process”.

Herein, the Petitioner have failed to establish the same and we do not find the tender condition to be arbitrary or violative of principle of natural justice as it is backed by well-placed reasons. Additionally, we find no fault in the decision-making process.

- In *Kujla Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL*, the Court held that the decision of a tender floating authority is subject to review on the touchstones of principles of natural justice and doctrine of proportionality. We do not find the “setting up of plant” condition to be restrictive. It was open to everyone to submit their bid. Nothing prevented the Petitioners also to submit their bids by agreeing to the said condition. We also consider that this condition was set up in public interest, to ensure that there is consistency and certainty in supply.
- In *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, the facts of the case are wholly different from the case at hand. Therefore, we shall proceed to differentiate the same on the principle/observation cited. The principle requires the State and its instrumentalities to act fairly, justly and reasonably when it is a party to a contract. We do not find the applicability of this principle in this case either. The Respondent No. 2 in the case at hand floated a tender with a “setting up of plant” condition which was well reasoned.
- The Petitioner also cited *M.J. Sivani v. State of Karnataka* and *Natural Resources Allocation, In re, Special Reference No. 1 of*

2012. However, the Petitioners have failed to make a case that the actions of Respondent No.2 are unfair, unjust, unreasonable, capricious, or biased.

- Having found no injustice in this, the reliance of Petitioner on *Secy., ONGC Ltd. v. V.U. Warrior* and *Dwarka Nath v. ITO* is misplaced.

67) It would be pertinent to reiterate that court in its exercise of judicial scrutiny is not to decide what would be a better tender condition. The court's judicial review of administrative decisions and conditions extends to decisions that are arbitrary, discriminatory, unreasonable, malafide, unjust, or actuated by bias. This has also been held in the various cases cited by the Petitioner. Having been satisfied by the reasoning and rationale of Respondent No. 2 for incorporating the impugned tender condition, the petitions are liable to be dismissed.

Accordingly, the writ petitions are dismissed being devoid of merit, and on the grounds of inappropriate conduct, delay and laches, with costs quantified at Rs. 2 lakhs each to be deposited with the Lawyers Welfare Fund, Delhi High Court within 2 weeks.

JASMEET SINGH, J

VIPIN SANGHI, J

JULY 06, 2021 / 'ms'-'so'