



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 9698 OF 2026

M/s. Pragati Construction, Latur
& M/s. R. B. Krishnani, Pune,
Joint Venture (JV) having its
Registered Office at : Kapilanand,
Plot No.23, Central Bank Colony,
Pragati Nagar, Ring Road, Latur – 413 512
Through its Authorised signatory,
Kapil s/o Govindrao Makne,
Age : 35 years, Occu.: Business and
social work, R/o. society chowk,
House No.1394, Tq. Chakur, Dist. Latur

...Petitioner

Versus

1. State of Maharashtra
Through its Principal Secretary,
Water Resource Department,
Mantralaya, Mumbai – 32.
2. TAPI Irrigation Development Corporation,
Jalgaon, Chief Engineer Office, Sinchan
Bhawan, Near Akashwani Chowk, Prabhat
Colony, Jalgaon, Maharashtra – 425 001.
3. Chief Engineer,
TAPI Irrigation Development Corporation,
Jalgaon.
4. Executive Engineer,
Minor Irrigation Division, Jalgaon.
5. Sub-Divisional Engineer,
Minor Irrigation Survey No.1 Division,
Jalgaon.
6. M/s. Phaloudi Construction and
Infrastructure Pvt. Ltd. Indore,
Through its Managing Authority,

203, Panama Tower, Near Hotel
Crown Palace, Kanchanbaug Indore,
Madhya Pradesh – 452 001
Email ID : pci Lindindore@gmail.com

7. M/s. Jagdish Gupta, Indore,
Through its Managing Authority,
63, Ushanagar Extension, Sudama Nagar,
Madhya Pradesh – 452 009
jagdishguptaconstructionpvtltd@gmail.com
jagdish.12aug@gmail.com
jagdishguptaconstructions23@gmail.com

...Respondents

Mr. V. D. Salunke h/f. Mr. M. V. Salunke, Advocate for the Petitioner.
Mr. N. S. Tekale, AGP for Respondent No.1-State.
Mr. R. N. Dhorde, Senior Counsel a/w Mr. P. S. Dighe i/by Mr. V. R.
Dhorde, Advocate for Respondent Nos.2 to 5.
Mr. A. I. Deshmukh, Advocate for Respondent Nos.6 & 7.

**CORAM : KISHORE C. SANT &
JITENDRA JAIN, JJ.**

RESERVED ON : 1st OCTOBER, 2026

PRONOUNCED ON : 5th OCTOBER, 2026

JUDGMENT :- *(Per - Jitendra Jain, J.)*

1. **Rule.** Rule made returnable forthwith. By consent, heard finally.
2. This petition is filed by the petitioner under Article 226 of the Constitution of India challenging its disqualification by the Technical Bid Evaluation Committee of respondent no.2-TAPI Irrigation. Respondent nos.2 to 5 are collectively referred to as “the respondents”.

BRIEF FACTS :-

3. Respondents floated an E-tender for the work of construction of a gravity closed pipeline distribution system from the Head Regulator of Padmalaya II Dam for a command area of 1982 Ha more particularly described in E-Tender Notice No.14 of 2026-27. The estimated cost mentioned in tender is Rs.65.67 crores. Various parties, including the petitioner and respondent no.6 and 7, applied in response to the said tender. The parties applying for the tender were required to make an online payment of Earnest Money Deposit (EMD). The petitioner made the payment of EMD and uploaded receipt but the bank statement was not uploaded.

4. On 4 August 2026, technical bids were opened and respondent nos.6 and 7 were declared as qualified, whereas the petitioner and other two bidders were declared as disqualified. The reason for petitioner's disqualification, as mentioned in the statement, is its failure to upload bank statement as mandated by Point no.25 of Volume – I of Detailed Tender Notice.

5. On 6 August 2026, financial bids of respondent nos.6 and 7 were opened.

6. The petitioner being aggrieved by its disqualification has instituted the present petition on 7 August 2026. This Court on 7 August 2026 directed respondents not to finalise the tender process without prior

permission of this Court. Pleadings of the respondents and the petitioner were filed and the matter is heard today finally.

SUBMISSIONS OF PETITIONER :-

7. Mr. Salunke, learned counsel for the petitioner submitted that the tender conditions only provided for uploading the receipt of online payment of tender fee and EMD. There is no requirement of uploading the bank statement as per E-Tender Notice No.14. He relied upon overruling clause at page 62 of the petition on guidelines to contractors mentioned in E-Tender Notice No.14 which reads as under :-

Guidelines of Contractors Regarding Government of Maharashtra e- tendering system

These conditions will over-rule the conditions stated in the Tender Documents, wherever relevant and applicable. However, in case of dispute on any contradictory meaning of two or more clauses, decision of the Superintending Engineer shall be final and binding on both parts.

8. He submitted that the condition of uploading bank statement is appearing in tender documents and not in the tender notice and, therefore, by overriding clause in E-Tender Notice, rejection by the respondents on the ground that bank statement has not been uploaded is manifestly arbitrary and unreasonable. He, in alternative, further submitted that no opportunity of hearing was given by the respondents to rectify the said defect and, therefore, there has been a violation of principles of natural justice. He also submitted that petitioner was not made aware of reason for disqualification. He also submitted that on a

comparison of the financial bids, the petitioner's quote is lower than the quotes of the successful bidders. He submitted that this being a public project, the Court should interfere and quash the disqualification of the petitioner. Mr. Salunke further pointed out to the reply of the respondents, wherein it is stated that the technical evaluation bid has been uploaded on 3 August 2026 and the bidders were given an opportunity of two days for raising objections, whereas in effect the technical bid was uploaded on 4 August 2026. He also attacked the Technical Evaluation Report filed with reply at page 92 and submitted that respondents have intentionally not mentioned date of this report. He relied upon the decision of the Hon'ble Supreme Court in the case of *Poddar Steel Corporation vs. Ganesh Engineering Works*¹ and prayed for permitting the petitioner to file bank statement and rectify the defect.

SUBMISSIONS OF RESPONDENT NOS.2 TO 5 :-

9. Per contra, Mr. Dhorde, learned senior counsel appearing for respondent nos.2 to 5 vehemently opposed the petition. He referred to various clauses of tender documents and notices and submitted that time and again and at more than one place, the bidders were informed that if the bank statement is not uploaded, then the bids will be considered as non-responsive. He also further referred to 1983 Government Resolution (GR), which deals with the online tender conditions in support of this

¹ (1991) 3 SCC 273

submission. Learned senior counsel further submitted that the tender process is online and it is expressly provided that no physical document will be accepted. He also gave the rationale for requiring such bank statement to be uploaded alongwith the tender namely, cartelisation etc. He further submitted that the petitioner, in the petition itself, has admitted that they were aware about the reason for disqualification on 4 August 2026. Learned senior counsel relied upon following decisions in support of his above submissions that Court ought to exercise restraint in interfering with tender matters and prayed for dismissal of the petition.

(a) *Glodyne Technoserve Limited vs. State of Madhya Pradesh & Ors.*²

(b) *K. K. Vidyut, Ahmednagar vs. Union of India & Ors.*³

(c) *N. G. Projects Limited vs. Vinod Kumar Jain & Ors.*⁴

(d) *Prasad Sheth vs. State of Goa*⁵

(e) *Utkal Suppliers vs. Maa Kanak Durga Enterprises & Ors.*⁶

SUBMISSIONS OF RESPONDENT NOS.6 & 7 :-

10. Mr. Deshmukh, learned counsel for respondent nos.6 and 7- successful bidders adopts the arguments of learned senior counsel Mr. Dhorde and further submits that in special instructions to the bidders, it is specifically stated that the bidder should read the terms and conditions of the tender and accept the same to proceed further to submit the bids. He further referred to E-Tender Notice No.14, wherein it is

2 (2011) 5 SCC 103

3 2016 (6) Mh.L.J. 806

4 (2022) 6 SCC 127

5 2022 SCC OnLine Bom 1179

6 (2021) 14 SCC 612

stated that tender documents should be downloaded from the Government website, on which detailed instructions and information regarding E-Tender are made available. He also prayed for dismissal of the petition.

11. We have heard Mr. Salunke, learned counsel for the petitioner, Mr. Tekale, learned AGP for respondent no.1-State, Mr. Dhorde, learned senior counsel for respondent nos.2 to 5 and Mr. Deshmukh, learned counsel for respondent nos.6 and 7 and with their assistance have also perused the relevant pages of the documents which were brought to our notice by all the counsel.

ANALYSIS & CONCLUSIONS :-

12. There is no dispute that the bank statement has not been uploaded alongwith tender document. The petitioner has, however, now annexed the relevant bank statement in the rejoinder to the reply of respondents to show that the EMD money has been paid from its account.

13. The issue which arises for our consideration is whether the failure to upload the bank statement alongwith tender document would entitle the respondents to reject the technical bid of the petitioner. Therefore, it is relevant to quote clauses of the tender notice and tender documents in this regard, on which the parties have placed heavy reliance.

14. Following are the clauses of Notice Inviting Tender annexed at page 133 which reads as under:-

2) The forms of Tender documents are available on the e Tendering website of Govt. of Maharashtra <https://mahatenders.gov.in>. The aspiring Bidders will have to download Tender form, from the website mentioned above. The bidder has to fill in formats given in downloaded tender document and upload to the above said website. Also he has to upload the scanned copy of duly filled in formats, **along with scanned copies of required documents.**

4) Blank tender forms will have to be downloaded by the contractor only from the website of Govt. of Maharashtra <https://mahatenders.gov.in>. While submitting the duly filled in Tender Documents, the Bidder are required to deposit Tender processing fee of Rs. 5,900/- and E.M.D. Rs.32,83,850/- through e-payment gateway. The E.M.D. online shall be submitted in NEFT / RTGS from contractor's own bank account, tender fee and EMD transferred from any other account shall not be considered and in such a case, **the tender shall be considered as non-responsive.** As per GR Nivida/0417/(pr.kr.247/17) Mo. pr.-1 Date.18/10/2023 and Point No. 3.3 and 9.2 (ii), the contractor has to prepare & submit the required Documents Online on or before as per schedule. **Hard copy of tender documents will not be accepted.**

7) Additional details regarding e-tendering are available in the Tender Document on portal. If any assistance is required regarding e-tendering (Uploading and Downloading), please contact on NIC's e-procurement help line Number 0120-4001002, 4001005, 6277787.

Page No. 142 of Section I of Detailed Tender Notice :-

1.3-A e-Tendering Instruction to Applicants :

...

....

7. Bidder should arrange for the EMD as specified in the tender and EMD to be deposited Online/e-payment gate way available on web site (<https://mahatenders.gov.in>) within the stipulated date and time from the account of concerned contractor. The scan copy of receipt of online/NEFT/RTGS is required to be uploaded along with tender document.

As per Gov GR (WRD) Nivida 0417/(pra.kra.247/117) Mo.pra.-1 date 18/10/2023 mentioned in para No. 3.3 & 9.2(ii), Online EMD amount must be invariably deposited / transferred from the contractors own bank account only. Bank statement showing the transaction shall be submitted

in the envelope No. 01. Bid submitted without bank statement shall be considered as nonresponsive. EMD transferred from any other account shall not be considered & in such a case the tender shall be considered as non-responsive.

Page No. 149 of Rejoinder :-

7.0 MANNER OF ON-LINE SUBMISSION OF e-TENDER AND ITS ACCOMPANIMENTS:

Tender is to be submitted on-line on the Government of Maharashtra website (<https://mahatenders.gov.in>) in two separate e-covers.

A) Cover No.1:-

Note: - Only Scan Copy of Original Certificate will be considered

The first cover on the portal as clearly marked as Technical Cover No.1 shall contain the following documents duly scanned and uploaded.

I) Detail of online deposit of tender fee & earnest money through payment gateway by the bidders by modes e-payment gate way available on web site (<https://mahatenders.gov.in>) transfer of bank having core banking facility as stated in 1.3 of Annexure 'A'. Certificates of exemption for payment of earnest money shall not be accepted. Actual payment receipt of EMD deposited online through e-payment Gateway available on website (<https://mahatenders.gov.in>) shall be uploaded with tender documents within stipulated date and time. EMD and SD to be paid from Bidders account only, Bidder should upload bank statement clearly showing transaction and bidders details such as Name, Account no., etc.

Page Nos. 158, 164 and 165 of Rejoinder :-

8.1 TECHNICAL Cover No.1

*First of all, TECHNICAL Cover No.1 of the tenderer will be on-line opened to verify its contents as per requirements. For the purpose of this particular contract, the tenderer shall meet the requirement as stated at Sr.No.8 in Annex-"A" of this section. **If the various documents contained in this 'covers' do not meet the requirements of the department, a note will be recorded accordingly by the tender opening (on-line) authority, and the said tenderers Cover No.2 will not be considered for further action, and the same will be recorded. The decision of the tender opening authority shall be final in this regard and binding on the contractors.***

19) Tender documents from bidders will not be accepted in physical form (hard copy) in any circumstances except original Demand Draft, Bank Guarantee.

*22) All Conditions laid down in the **Government of Maharashtra Resolution** WRD Department Marathi Gr. No. Nivida 0417/ (Pra.Kra 247/17) Mopra-1 **Date.18/10/2023** and guideline issued by Govt. of*

Maharashtra from time to time shall be applicable for uploading / opening and acceptance of the tender.

24) No Evaluation will be done when no documents are submitted with the bid and tender will not be qualified for the work.

*25) It shall be mandatory to pay EMD Amount through online RTGS/ NEFT from Concerned Deposit Account of the Tenderer. Online EMD amount must be invariably deposited/transferred from the contractor's own bank account only. **Bank statement showing the transaction shall be submitted in envelope No.1 Bid Submitted without bank statement shall be considered as non-responsive.***

15. Certain clauses of Government Resolution dated 18 October 2023 reads as under :-

१.२ लिफाफा क्र. १ :- यामध्ये खालील कागदपत्रांच्या प्रती निविदाकाराने सादर कराव्यात.

i.

ii. आवश्यक बयाणा रकम भरल्याचा पुरावा (Scan copy of bank statement showing EMD payment made)

१.५ कोणती कागदपत्रे निविदेसोबत सादर न केल्यास मुल्यांकन केले जाणार नाही (No evaluation will be done) व निविदा अपात्र ठरविण्यात येईल याची स्पष्ट तरतुद निविदेत करावी.

१७.५ निविदाकाराने सादर केलेल्या कागदपत्रांची तपासणी करताना नवीन कागदपत्रे मागविण्यात येऊ नयेत. फक्त सादर केलेल्या कागदपत्रांमध्ये स्पष्टता नसल्यास त्याबाबतचे स्पष्टीकरण (Clarification) मागविण्यात यावे.

11. The bidder reads the terms and conditions and accepts the same to proceed further to submit the bids.

16. On a perusal of the above clauses which are mentioned in the detailed tender notice and tender document, it is clear that uploading of the bank statement alongwith tender document is a mandatory pre-condition before evaluating the technical bid. There is an express clause which states that no physical document will be accepted. The authority

issuing the tender is best placed to decide what conditions should be mentioned to be complied with while uploading the tender. This Court cannot sit in appeal over every such condition which the bidders have, with open eyes, accepted before bidding. The petitioner, at more than one place, was made aware in these documents that if the bank statement is not uploaded the bid will be treated as non-responsive.

17. It is also important to note that these are commercial documents, though relating to a public project, but when a private commercial person files its bid, and moreso when he has accepted all the terms and conditions of the tender documents, it cannot be permitted to argue that such a condition should be dispensed with or an opportunity should be given for its compliance. The above clauses expressly state that, in the absence of the bank statement being uploaded, the bid will be treated as non-responsive. The petitioner, having agreed to these conditions, cannot now seek its dispensation, and more particularly from this Court in its extraordinary jurisdiction while dealing with tender matters where minimum interference is to be exercised by this Court.

18. There could be various reasons for uploading of the bank statement to be made mandatory, namely, to ascertain whether the bidders have made multiple bids, whether the bidder has the financial capacity to make the payment of EMD, whether multiple bidders have used the same account for depositing EMD, etc. The clause itself indicates

that it is to verify that EMD has been paid from bidder's own account that bank statement is to be uploaded and consequences of its failure to do so is also provided therein. These are the reasons which the authority issuing the tender, to safeguard itself, has provided, and therefore, this Court cannot step into the shoes of the issuing authority.

19. The GR dated 18 October 2023 is also referred to in these tender conditions and documents, wherein the parties have agreed that the same would be applicable to the present tender. The various clauses of this GR reproduced above also indicates that the whole process of filing the tender will be online, no physical document will be accepted, and if any deficiency is found on account of non-furnishing of certain documents alongwith tender, then such bid would not be considered. There is no challenge to this GR and rightly so because the petitioner while bidding has agreed to all the terms and conditions of the tender including the terms and conditions of the GR, which is specifically incorporated in the present tender.

20. It is not a case of a venial breach, but in respect of every document to be uploaded as per the requirement of the tender, there is a reason and object, and therefore, permitting such filling up of gaps after the technical bid is rejected would derail the process of tender, and such course of action cannot be permitted in matters relating to a tender of a public project, moreso in this part of the State which invariably has to

face the wrath of drought.

21. The petitioner should have taken utmost care in complying with all the requirements of uploading the documents alongwith the tender, moreso, when it was expressly made clear, in no uncertain terms and at more than one place, that if the bank statement is not uploaded, then such a bid will not be considered.

22. The E-Tender at pages 61-62 of the petition, relied upon by the petitioner, itself states that the right to accept or reject the tender is reserved by the Chief Engineer and a conditional tender will not be accepted. At page 62, it is specifically mentioned that the contractor shall study the guidelines regarding e-tendering to get clarification on the e-tendering process. At page 61, it is also mentioned that tender document should be downloaded from website and detailed instructions are given on that website. At page 63, terms and conditions are accepted by the bidder. Therefore, tender documents form part of the tender notice.

23. It is also important to note that the technical bid was opened on 4th August 2026, and the same was uploaded, wherein it was specified that the bid of the petitioner is rejected on the ground of failure to upload the bank statement. The petitioner himself, in the petition, in paragraph Nos. 11 and 9, has admitted this. In our view, therefore, it cannot be said that the petitioner was not made aware of the reason for

disqualification. If the petitioner's submission is accepted, then we fail to understand how the petitioner has annexed page 68A, which contains reason for disqualification coupled with their admission. The petitioner did not raise any objection with respondents but filed present writ petition on 7 August 2026 by which time financial bids were already opened as per the schedule. The challenge to date not being mentioned at page 92 of the petition on Technical Evaluation Report, on these facts, does not carry the case of the petitioner any further.

24. Learned counsel for the petitioner has not brought to our notice any clause of the tender condition or tender document which states that the petitioner should be given an opportunity to rectify the defect of not uploading the bank statement. In the absence of any clause giving such an opportunity to rectify the defect as provided in the tender document, such a requirement cannot be read into the present matter. The present tender matter stands on a different footing than the other matters where principles of natural justice are read into by the Courts. On the contrary, it is expressly mentioned that if bank statement is not uploaded then bids will be treated as non-responsive. This clearly shows that the chance of rectification to upload bank statement is given a go-by.

25. The learned counsel for the petitioner submitted, by referring to the e-tender notice guidelines, that it is specified therein that the conditions in the e-tender notice will overrule the conditions stated in the

tender document wherever relevant and applicable, and since uploading of the bank statement is not specified in the e-tender notice, but only uploading of the EMD payment receipt is mentioned, which is complied with, the reason for rejection is unjustifiable. In our view, this submission cannot be accepted for more than one reason. Firstly, in the e-tender notice, there is nothing mentioned regarding uploading of the bank statement, whereas the same is mentioned in the tender document. The guidelines relating to overruling would apply where there is a conflict between the conditions mentioned in the e-tender notice and tender document. In the absence of any contradiction with respect to uploading of the bank statement between what is specified in the e-tender notice and tender document, this clause cannot be made applicable. In any case, the said guidelines further state that, in case of a dispute between two or more clauses, the decision of the Superintending Engineer will be final and binding on both the parties. Assuming that there is any contradiction, the Superintending Engineer, in this case, who has approved the technical bid and who has evaluated the technical bid, has rejected the bid of the petitioner on the ground of non-compliance with the requirement of uploading the bank statements. Therefore, even on this count, the submission made by the petitioner cannot be accepted. Thirdly, the notice inviting tender itself provides for rejection of the bid if the bank statements are not uploaded, and therefore, the submission made that

such a condition is not there in the e-tender notice also cannot be accepted. We have also reproduced the relevant clauses of the e-tender notice and tender documents above. Therefore, this submission of the petitioner cannot be accepted.

26. The learned counsel for the petitioner has also advanced a submission with respect to his bid being lower than that of the successful bidder and, therefore this Court should interfere in the matter. We are afraid, we cannot accept such a submission. We have already upheld the rejection of the technical bid of the petitioner and, therefore, price quoted cannot be considered because financial bid will be considered only if technical bid is accepted. Even otherwise, the difference between financial bid of the petitioner and that of the successful bidder is only +1% -1% which is not a material factor for this Court to shock its conscience, moreso when the estimated cost as per tender is Rs.65 crores. Therefore, this submission is also rejected.

27. The decision relied upon by the petitioner in the case of ***Poddar Steel Corporation (supra)*** is distinguishable on facts. In that case, the tender was accompanied by a banker's cheque issued by the Union Bank of India and not the State Bank as required under Clause no.6 of the tender, but the banker's cheque was enclosed alongwith the tender document. It is on this fact that the Hon'ble Supreme Court classified tender conditions into two categories, namely, essential conditions of

eligibility and ancillary object to be achieved by the condition and since the banker's cheque was filed alongwith tender document, the Hon'ble Supreme Court observed that the eligibility condition was satisfied, though the banker's cheque was issued by the Union Bank of India and not the State Bank. In the instant case, the tender process is online and not physical as was the case before the Hon'ble Supreme Court. Secondly, in the instant case before us, there is an express condition that no physical document will be accepted and further if the bank statement is not uploaded, then the bid will not be considered at all. There was no such clause before the Hon'ble Supreme Court in the case of *Poddar Steel Corporation (supra)*. In our view, the facts being different in the case of *Poddar Steel Corporation (supra)*, the said decision cannot be of any assistance to the petitioner.

28. Learned senior counsel Mr. Dhorde for respondent nos.2 to 5 is justified in relying upon the decisions which are referred to above which caution this Court to exercise restraint in interfering with tender matters. The relevant paragraphs of these decisions are reproduced hereunder.

29. The relevant paragraphs of *Glodyne Technoserve Limited vs. State of Madhya Pradesh & Ors. (supra)* read as under :-

13. It was urged by the learned counsel that this is not a case of a tenderer not having a valid certification as required, but a case of not filing it with the bid documents despite having the same. Mr Salve urged that in view of Clause 9 of Section 7.1.1, the appellant's bid documents had been wrongly rejected at the technical bid stage, without even

considering the financial bid which had been submitted by it.

46. The above provision obliges a tenderer to produce along with the bid document a copy of the quality certificate which is valid and active on the date of submission of the bid and it does not enable a bidder to withhold the copy of such quality certificate. Where the quality certificate will be expiring shortly and is due for renewal, the bidder is also obliged to produce the renewed certificate at the time of signing of the contract. The appellant claimed to have a valid and active ISO 9001:2000 certificate at the time of submission of the bid, but did not produce a copy of the said certificate along with the bid document.

47. The submissions made on behalf of the appellant proceeds on the basis that it was entitled, almost as a matter of right, not to submit the documents required to be submitted along with the bid documents on the supposition that, even if such documents were valid and active, they could be submitted at the time of signing of the memorandum of understanding. The appellant had a valid and active ISO 9001:2000 certification which it did not submit along with the bid documents, may be due to inadvertence, but whether such explanation was to be accepted or not lay within the discretionary powers of the authority inviting the bids. The decision taken to reject the technical bid of the appellant cannot be said to be perverse or arbitrary. We need not refer to the decisions cited by the learned Attorney General or the appellant in this regard, as the principles enunciated therein are well established.

30. The relevant paragraphs of *K. K. Vidyut, Ahmednagar vs. Union of India & Ors. (supra)* read as under :-

11. Perusal of clause (e) would clearly reveal that if the tenderers fail to submit the above details along with their offer, their offer will be summarily rejected. It could, thus, be seen that the said clause makes it mandatory to submit the documents mentioned therein and provides for consequences of non-submission of the documents. It could further be clearly seen that it is essential for the bidder to be qualified in the financial bid, to submit the documents mentioned in the said clause. It even provides that in case any fresh contract is awarded to the tenderer in between the date of submission and prior to finalization of the instant tender, the tenderer must immediately inform in writing to the tender inviting authority for the purpose of evaluation of their bidding capacity.

12. It would thus be clearly seen that the aforesaid clauses were applicable to all the tenderers. We may say that they were not only applicable but they were very much essential because in the absence of

those documents, the employer could not have ascertained the technical and financial viability of the bidder to participate in the process. Admittedly, the documents as required under subclause (c) and (e) of Clause 6, have not been submitted by the petitioner.

31. The relevant paragraphs of ***N. G. Projects Limited vs. Vinod Kumar Jain & Ors. (supra)*** read as under :-

11. The learned counsel for the appellant also referred to a judgment reported as Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] wherein it was held that it was not for the Court to substitute its opinion in respect of acceptance of bank guarantee. It was held that when a particular format for a bank guarantee is prescribed, then the bidder is required to stick to that particular format alone with the caveat that the State reserves the right to deviate from the terms of the bid document within the acceptable parameters. This Court held as under : (SCC pp. 632-33 & 638, paras 32, 37, 47 & 49)

“32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rear-ranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view

of the employer. As held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision 'that no responsible authority acting reasonably and in accordance with relevant law could have reached' as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216].

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that 'Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive'. Surely, CCL ex facie intended this term to be mandatory, yet the High Court held [SLL-SML (Joint Venture Consortium) v. Central Coalfields Ltd., 2015 SCC OnLine Jhar 4819] that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court."

17. *Therefore, the position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. Applying the aforesaid position of law to the present case, it has been the contention of Respondent 1 that the format for bank guarantee was not followed strictly by the State and that the relaxation given was not uniform, in that Respondent 1 was singled*

out. The said contention has found favour with the courts below.

18. In the present matter, Respondent 1 submitted its first bank guarantee on 8-7-2019 in relation to the first tender for the same project. However, this first tender was cancelled through a notice, as acknowledged by Respondent 1. This being the case, being fully aware of the fact that the first tender was no more in force and given that there was specifically a new tender in place, Respondent 1 was required to submit a bank guarantee in the format specified as per the agreement. However, Respondent 1 opted to use the same bank guarantee which was drawn on 8-7-2019, albeit with a letter from the bank indicating that there is now an amendment with regard to the dates and the contract therein. It is patently clear that if the format for a bank guarantee is an essential condition of the contract, the format in which the respondent has opted to submit it is a substantial variation in the terms of the contract. If the variation that is done by Respondent 1 is considered to be an acceptable variation, then it would create an onerous burden on the tendering authority to ensure that each underlying bank guarantee is valid and further to consider whether the amendment letter itself was with the full knowledge and consent of the bank. As it were, on the facts of the case, the State informed the High Court that it had attempted to verify the amendment but there was no response from the Bank. This being the case, it is submitted that the relaxation in the format to bank guarantee was rightly not provided to the respondent.

32. The relevant paragraphs of *Utkal Suppliers (Supra)* read as under :-

14. This Court has repeatedly held that judicial review in these matters is equivalent to judicial restraint in these matters. What is reviewed is not the decision itself but the manner in which it was made. The writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority. This has clearly been held in the celebrated case of Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] , para 94 of which states as follows : (SCC pp. 687-88)

“94. The principles deducible from the above are:

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

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

15. *Equally, this Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.[Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, para 15] (“Afcons”), has laid down : (SCC p. 825, paras 14-15)*

“14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause

4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there are mala fides or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

This view of the law has been subsequently followed repeatedly — see *Montecarlo Ltd. v. NTPC* [*Montecarlo Ltd .v. NTPC*, (2016) 15 SCC 272] [at SCC para 25], *Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd.* [*Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd.*, (2019) 14 SCC 81] [at SCC paras 38 and 39], and *State of M.P. v. U.P. State Bridge Corpn. Ltd.* [*State of M.P. v. U.P. State Bridge Corpn. Ltd.*, (2022) 16 SCC 633 : 2020 SCC OnLine SC 1001] [at SCC paras 24 to 26].

16. In *Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors* [*Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors*, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , after referring to para 15 of *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, para 15] , it was held : (*Galaxy Transport Agencies case* [*Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors*, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , SCC paras 15-17)

“15. In the judgment in *Bharat Coking Coal Ltd. v. AMR Dev Prabha* [*Bharat Coking Coal Ltd. v. AMR Dev Prabha*, (2020) 16 SCC 759] , under the heading “Deference to authority’s interpretation”, this Court stated : (SCC p. 776, paras 50-52)

‘50. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual

terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

51. In the present facts, it is clear that BCCL and India have laid recourse to clauses of the NIT, whether it be to justify condonation of delay of Respondent 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, para 15]

52. The High Court [AMR Dev Prabha v. Union of India, 2018 SCC OnLine Jhar 2708] ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.'

16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489] , this Court held as follows : (SCC pp. 501-02, para 20)

'20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.'

17. In accordance with these judgments and noting that the

interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench [New JK Roadways v. Union Territory of J&K, 2020 SCC OnLine J&K 733] ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the NIT. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.”

33. The decision of *Poddar Steel Corporation (Supra)* came up for consideration before the Hon’ble Supreme Court in the case of *Central Coalfields Limited and Another vs. SLL-SML (Joint Venture Consortium) & Ors.*⁷. The issue before the Hon’ble Supreme Court was whether the condition of furnishing a bank guarantee in a prescribed form mentioned in the tender document is an essential condition or not and whether a bank guarantee filed otherwise than in the prescribed form can be a ground for rejection of the tender. The decision in the case of *Poddar Steel Corporation (supra)* was cited for the proposition that the bank guarantee format is not an essential condition but an ancillary condition. The Hon’ble Supreme Court, in paragraph 42, observed that *Poddar Steel Corporation (supra)* did not advert to the “privilege of participation” principle laid down in *Ramana Dayaram Shetty vs. The International Airport Authority of India*⁸. This principle was ignored, as per the Hon’ble Supreme Court, in the case of *Poddar Steel Corporation (supra)*. In paragraph 46, the Hon’ble Supreme Court accepts that in *Poddar Steel*

⁷ (2016) 8 SCC 622

⁸ (1997) 3 SCC 489

Corporation (supra), a distinction has been drawn between essential and ancillary or subsidiary conditions in the bid documents. The Hon'ble Supreme Court, in paragraph 47, after considering *Poddar Steel Corporation (supra)* and other decisions, especially *Ramana Dayaram Shetty (supra)* observes that the issue of acceptance or rejection of a bid should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. The Court relies upon the decision in the case of *Ramana Dayaram Shetty (supra)* and observes that the terms of the contract cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. The Court further went on to observe in paragraph 48 that whether a term of the tender is essential or not is a decision which should be taken by the employer and which the Court should respect. The decision of the employer to treat the condition as an essential condition cannot be questioned by the Court. If the Court starts questioning the decision of the employer, then the Court would be taking over the function of the tender-issuing authority, which it cannot do.

34. Applying the ratio of this decision, which has considered the earlier decision of *Poddar Steel Corporation (supra)*, to the facts before this Court in the instant case, the respondents have, in the tender document, clearly spelt out their intention that non-uploading of the bank statement would result in the bid not being considered. On a

reading of various clauses of the tender document and e-tender notice, the respondents have treated non-uploading of the bank statement as an essential condition. Therefore, this Court cannot treat non-compliance with such a condition, which has been treated by the respondents as mandatory, as directory and permit the petitioner to comply with the same at this stage.

35. The decision in the case of *Poddar Steel Corporation (supra)* once again came up for consideration before the Hon'ble Supreme Court in the case of *Vidarbha Irrigation Development Corporation & Ors. vs. M/s. Anoj Kumar Agarwala & Ors.*⁹. In this case, the bidder was put to notice that if any deviation from terms of the tender is found, then the tender will be treated as non-responsive. The bidder furnished a bank guarantee for a period lesser than what was required by the tender. The bid came to be rejected on this ground. The Hon'ble Supreme Court after considering the decision in the case of *Poddar Steel Corporation (supra)* upheld the rejection. The facts of present case before us is similar to that of *Vidarbha Irrigation Development Corporation & Ors. (supra)* and, therefore, we do not see any reason to interfere in the decision of the respondents in rejecting technical bid of the petitioner.

36. Therefore, in our view, the decision of *Poddar Steel Corporation (supra)*, in the light of the subsequent development in law by the Hon'ble

9 (2020) 17 SCC 577

Supreme Court in various decisions referred to hereinabove, cannot come to the assistance of the petitioner for seeking rectification of an essential condition so as to treat the petitioner as qualified in the technical bid.

37. The Hon'ble Supreme Court has repeatedly cautioned and advised the Court to exercise judicial restraint in matters dealing with tenders since the Constitutional Court does not have the expertise to correct decisions by substituting its own decision for the decision of the authority.

38. For all the above reasons, the writ petition is dismissed. Rule is discharged and interim relief stands vacated.

(JITENDRA JAIN, J.)

(KISHORE C. SANT, J.)

Sayyed