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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 2035 OF 2016

High-G Transmissions Pvt. Ltd.]
 A Company incorporated under The Companies]
 Act, 1956 and having their registered office address at]
 601-603, Kshitij, Opp. Andheri Sports Complex,]
 Veera Desai Road, Andheri West, Mumbai - 400 058.] ..Petitioner

Versus

1. Maharashtra State Road Development]
 Corporation Ltd.]
 A Government of Maharashtra undertaking,]
 having its head office at Nepean Sea Road,]
 near Priyadarshani Park, Mumbai - 400 036.]
 2. The State of Maharashtra]
 Through The Secretary, Ministry of Road]
 Transport, Mantralaya.] .. Respondents

Mr. Dinyar Madon, Sr. Advocate a/w. Mr. Kunal Bhanage for the Petitioner.

Mr. P. P. Chavan i/b Ms. Reshmarani J. Nathani for Respondent No.1.

Mr. U. S. Upadhyay, AGP for respondent No.2.

**CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**
DATE : 8th AUGUST, 2016

ORAL JUDGMENT : (Per Dr. Shalini Phansalkar-Joshi, J.)

1. Rule. Rule made returnable forthwith. Heard finally with consent of the learned counsel for the parties.

2. This Writ Petition filed under Article 226 of the Constitution of India raises core question as to legality and validity of the terms and conditions of the tender bid offered by respondent No.1. The petitioner has challenged the same on the ground that particular term Nos.2 and 3 of the tender bid are highly discriminatory for ascertaining eligibility of bidders and hence those terms and conditions in the tender bid need to be quashed and set aside in their entirety or in the alternate to direct suitable modification of the said terms of eligibility, as deemed fit and proper by this Court.

3. Facts, giving rise to this writ petition can be stated, in brief, as under:

The petitioner is a private limited company incorporated and registered as "Infrastructure Provider" under Category-I for Telecom Service and is registered under Section VI of the Indian Telegraph Act, 1885. Respondent No.1 is the Maharashtra State Road Development Corporation Ltd., a State Public Sector Undertaking, primarily engaged in the work/activity relating to development and maintenance of roads, bridges, tunnels, etc in the State of Maharashtra. Respondent No.2 is the

State of Maharashtra, through its Secretary, Ministry of Transport.

4. Respondent No.1 has, vide a public notice issued in July, 2016, declared that it would be inviting tenders for grant of permission to install BTS (Base Transceiver Station) equipment along various flyovers/subways of MSRDC in and around Mumbai for a period of 5 years on as is where is basis. The bid document was uploaded on its website from 15th July to 30th July, 2016 and was made available for viewing to general public.

5. The petitioner, being in exclusive business of providing infrastructure services in the mobile and telecom sector and since the scope of work as envisaged in the bid document was well within the petitioner's technical expertise as also its financial capabilities, the petitioner decided to bid for the said contract. However, after scrutinizing the eligibility criteria stipulating eight conditions for bidding to the said contract, the petitioner noticed that two of the conditions in the said tender document were such as to ensure that no new entity would be able to even think of entering the said sector, let alone bid for any contract for the same. Those two terms are contained in Clauses 2 and 3 of the Clause of Eligibility Criteria. Clause 2 of the Criteria provides that bidder should have annual turnover of minimum Rs.10 Cr within the last three years. Whereas Clause 3 provided that the project profile shall prove minimum three years similar accident free experience of installation, operation and

maintenance of BTS equipment on 180 poles located along roads, flyovers, skywalks, subways, foot over bridges in Government/Semi Government/Local Bodies in Mumbai Metropolitan Region Area.

6. The petitioner along with many similarly placed potential bidders submitted a representation to respondent No.1 during the pre-bid meeting convened on 20th July, 2016 bringing to its attention the fact that the aforesaid two conditions are highly discriminatory and should be dropped as the same seem to defy any logical or valid reasoning, thus justifying their exclusion from the said tender and they shall serve no purpose in scope of the work envisaged under the tender. However, to the dismay of petitioner and numerous similarly placed other entities, respondent No.1 failed and neglected to delete and/or modify the said conditions without citing reasons for rejecting the representation of the petitioner.

7. The petitioner is, therefore, constrained to approach this Court invoking its extraordinary writ jurisdiction for quashing of the said conditions, inter alia, on the ground that they are highly discriminatory and they are tailor-made to suit the only well established entities in the said business and are deliberately incorporated to keep new players out of the said market. It is submitted that the condition stipulated at serial No.2 clearly sets out the fact that the payment of royalty/charges for installation of the BTS equipment are payable in advance for a period of one year

preceding the said year. It is, therefore, submitted that when the charges are payable in advance and thus insulated against any possibility of loss or damage, there was no logic behind imposing the criteria that annual turnover of the bidder should be more than Rs.10 Cr within last three years. It is urged that this condition disqualifies new entities entering into the field who may have the financial capacity to successfully undertake the envisaged work as well as the technical expertise for the same, however, simply because they are newcomers, they cannot fulfill the criteria of 3 years experience of installation, operation and maintenance of 180 poles and of having annual turnover of Rs.10 Cr. within last three years. It is further contended that condition at serial No.3 also gives undue importance to previous project undertaken by operators in regard to not less than 180 poles belonging to Government and Semi Government Undertaking. According to the petitioner, when the tender allows bidders to apply for even a single pole, then in that case the said condition is clearly discriminatory. The said condition has also the effect of blocking out the entry of new entities who may not have executed project on roads and bridges operated by Government and Semi Government entities. Thus, this condition has the effect of further reducing the competition for entities who have executed such projects in the past and the new entities despite possessing better technical knowhow will not have a chance to even bid for such tenders.

8. According to petitioner, both these conditions at serial Nos.2 and 3 are opposite to the policy of the Government of promoting new start ups and new businesses. These restrictive policies adopted by respondent No.1 go directly against the progressive measures adopted by the State. It is further submitted that if these two conditions are allowed to remain, there will never be a level playing field and hence it is necessary to delete the same so that larger public interest would be properly served. The petitioner has, therefore, requested for issuance of necessary writ of mandamus either to quash these two conditions in their entirety or to suitably modify the same so that the new entities like the petitioner can participate in the tender process.

9. This writ petition came to be resisted by respondent No.1 by filing the affidavit-in-reply of its Executive Engineer contending, inter alia, that the petition is totally misconceived and beyond the scope of the judicial review. It is urged that this Court cannot sit as a Court of Appeal and decide the legality and validity of the terms and conditions of the tender. According to respondent, as per the own admission of petitioner, it does not satisfy the eligibility criteria laid down under the tender in respect of turnover and experience. In such circumstances, the petition challenging the terms and conditions of tender, which fall in the realm of contract, does not have any merit and is liable to be dismissed.

10. Respondent No.1 has, then in paras 4 and 5 of its affidavit-in-reply, tried to justify the incorporation of these two conditions by submitting that they are incorporated in order to ensure that, only competent bidders having sound financial background and experience, participate in the tender process. It is submitted that the present tender is for grant of permission to install BTS equipments on 424 poles in three corridors along various flyovers/subways of MSRDC. The base rate for all the poles as specified in Section IX of tender volume II varies from Rs.15,231/- to 22,313/-. Considering the same, condition of having minimum annual turnover of Rs.10 Cr. within last three years, as well as eligibility criteria of having three years similar accident free experience of installation, operation and maintenance of BTS equipment on 180 poles located along with roads, flyovers, skywalks, foot over bridges in Government/Semi Government/Local Bodies in Mumbai Metropolitan Region Area are absolutely reasonable and essential conditions. There is no arbitrariness or illegality attached to the said conditions.

11. As regards the eligibility of the petitioner, it is submitted that the petitioner company has been incorporated under the Companies Act, 1956 just few months back, on 01.01.2016 and registered on 12.04.2016, just 3 months months before the tender document, as Infrastructure Provider Category-I. Thus, the petitioner does not have any previous experience of similar work or turnover in respect of similar work. Hence,

as the petitioner is unable to bid for the tender, the petitioner is challenging the eligibility criteria in tender process.

12. Lastly, it is denied that these two conditions are incorporated so as to ensure that new entities are blocked from bidding for the tender or so as to ensure that tender work can be available only to limited and well established entities. It is submitted that the tender permits bids by Joint Venture or Consortium. Therefore, the new entrants like the petitioner who do not satisfy eligibility criteria as to turnover and experience can always submit the bid in Joint Venture or in Consortium with the entity who satisfies the eligibility criteria. Thus, the new entities are not deprived of any opportunity to participate in the bidding process. It is submitted that the route of Joint Venture or Consortium is specifically kept open for new entrants to gain experience of performing such contract. Therefore, there is absolutely no merit in the contention of the petitioner that restrictive policies are adopted by respondent No.1 to keep away the new players or entities from the tender process. In nut shell, thus it is submitted that the eligibility conditions as to turnover and experience are absolutely fair, just and reasonable, considering the nature of the tender. Hence, there is no merit in the contentions raised by the petitioner. The petition, therefore, needs to be dismissed.

13. In these facts and circumstances, we have heard learned

Senior Counsel for the petitioner, Mr. D. D. Madon, who has highlighted the relevant condition Nos.2 and 3 in tender document and relying on the decisions of the Apex Court in the case of *Meerut Development Authority Vs. Association of Management Studies & Anr.*¹, *Sterling Computers Ltd. Vs. M/s. M & N Publications Ltd & Ors.*² and *Mahesh Varma & Anr. Vs. State of Maharashtra & Ors.*³ tried to point out that these conditions being discriminatory, arbitrary and against the well established policies of the Government to encourage the new entities in the field, these conditions are required to be quashed and set aside. According to learned Senior Counsel for the petitioner these conditions are violating the basic principle of fair competition and level playing field. They are also against the guarantee of equality enshrined in Article 14 of the Constitution. He has further submitted that such conditions can ensure that no new entities find no place in the tender bid as these conditions have the effect of allowing only a limited and well established entities to secure such contract. According to him, these conditions also have no reasonable nexus or connection with the performance of the contract and from this aspect also they are highly discriminatory, arbitrary and need to be dropped or suitably modified.

14. *Per contra*, Mr. P. P. Chavan, learned counsel for respondent No.1 has justified the said conditions on the ground that the two criterias of

1 (2009) 6 SCC 171

2 (1993) 1 SCC 445

3 2008 SCC Online Bom 174 : AIR 2009 Bombay 29

capability and competence, being most important factors for performance of any contract, they cannot be sacrificed in the instant case. He has submitted that there need not be ever any apprehension of the new entities like the petitioner being left out of the field as such entities can participate by forming Joint Venture or any Consortium with other entities. Hence there lies hardly any substance in the grievance of the petitioner that these conditions are discriminatory or arbitrary. Learned counsel for respondent No.1 has, then placed reliance on the decisions of Hon'ble Supreme Court in the cases of *Tata Cellular Vs. Union of India*⁴ and *Directorate of Education & Ors. Vs. Educomp Datamatics Ltd & Ors.*⁵, to submit that the scope of judicial review of administrative decisions, especially in the cases of deciding the legality and validity of the terms and conditions of the tender being limited, this Court should be slow in interference in the same.

15. In our considered view, the law relating to judicial review of administrative actions or decisions is no more *res integra*. The Hon'ble Supreme Court has, in umpteen number of its decisions laid down various criterias about the contours and scope of such judicial review. Some of the judicial decisions are relied upon by the learned counsel for the parties also, like the leading judgment in the case of *Tata Cellular (supra)* wherein the Supreme Court has, after referring to its various earlier decisions, was

4 AIR 1996 SC 11

5 (2004) 4 SCC 19

pleased to observe in paras 85 and 86 as follows:

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

86. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

16. The Supreme Court has, in this case, also referred to its own observations in the case of *Sterling Computers (supra)* in para 111 as follows:

"111. In Sterling Computers Limited v. M/s. M. & N. Publications Limited, (1993) 1 SCC 445 at page 455 : (1993 AIR SCW 683 at p. 690), this Court observed thus:

"..... In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in 'bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the

principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

17. The Supreme Court has, then, in the decision of *Tata Cellular (supra)* summarised the principles which are deducible from its decisions as follows:

"113. The principles deducible from the above are :

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

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

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

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

(5) The Government must have freedom of contract. In other words, a fairplay 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."

18. This legal position is further confirmed by the Apex Court in its decision of *Directorate of Education & Ors. (supra)* wherein the moot question raised for determination was the extent of judicial review permissible in exercise of jurisdiction under Article 226 of the Constitution as to the terms of tender prescribing eligibility criteria. In that context the

issue raised before the Supreme Court was whether the High Court could change the terms incorporated in the tender notice on the ground of its being improper and that the objective would be better served by adopting different eligibility criteria? The argument advanced in the said case was also to the effect that the condition impugned appeared to have been incorporated solely with an intent to deprive large number of companies imparting computer education from bidding and to monopolize the same for big companies. The High Court accepted the said argument and allowed the writ petition thereby striking down the offending clause as being arbitrary and irrational.

19. When this order of the High Court was challenged before the Hon'ble Supreme Court, the submission advanced was that the terms of the tender prescribing the eligibility criteria are not subject to judicial review, in view of the number of decisions of the Supreme Court. It was further submitted that the High Court, while exercising the jurisdiction under Article 226 of the Constitution does not sit as a Court of Appeal; it merely reviews the manner in which the decision has been taken. It was argued that the Courts in exercise of their jurisdiction under Article 226 cannot and do not transgress in the policy decision taken by the Government.

20. While accepting this line of argument advanced by the learned counsel for the petitioner, the Hon'ble Supreme Court, after referring to its

decision in *Tata Cellular (supra)*, relied upon its another decision in the case of *Air India Ltd. Vs. Cochin International Airport Ltd.*⁶, especially on para No.7, which is reproduced as below:

"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 procedure 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."

21. The Hon'ble Supreme Court considered the principle, which was again restated by it in its decision in the case of *Monarch Infrastructure (P) Ltd. Vs. Commr., Ulhasnagar Municipal Corpn.*⁷ holding that,

"the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of the 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."

At the end, Hon'ble Supreme Court in this decision laid down the legal position as follows:

⁶ (2000) 2 SCC 617

⁷ (2000) 5 SCC 287

"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".

22. One of us (S.C. Dharmadhikari, J.) had an occasion to consider a similar issue and identical contentions. As a part of a Division Bench consisting of S. C. Dharmadhikari and B. P. Colabawalla, JJ. in *W. P. No. 2753 of 2013, Central Railway Caterer's Association and another Vs. Union of India and others*, decided on 8th January, 2016 this Court speaking through B. P. Colabawalla, J. held as under :-

"17. Before we deal with the arguments of Mr Jahagirdar on the different terms and conditions that he sought to assail before us, it would be apposite to reiterate some well settled legal principles. It is now well settled that fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive that is arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, interference by the courts is very limited. 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 such authorities is found to be malicious and a misuse of its statutory powers. Certain pre-conditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, here again, interference by courts is very restricted and no person can claim a fundamental right to carry on business with the Government. The Government and their undertakings must have a free hand in settling the terms of the tender and only if it is

*demonstrably arbitrary, discriminatory, malafide or actuated by bias, that 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 fairer, wiser or more logical. The Courts are not experts in this field and the Courts will be well advised not to substitute its own opinion for that of the experts in the field. These principles have been very succinctly set out by the Supreme Court in the case of **M/s. Michigan Rubber (India) Ltd V/s State of Karnataka and Others., (2012) 8 SCC 216**. Paragraphs 23, 24 and 35 of the aforesaid decision read thus:-*

“23. From the above decisions, the following principles emerge:

- (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
- (b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;*
- (c) 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;*
- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.*

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is*

- such that no responsible authority acting reasonably and in accordance with relevant law could have reached”? and*
- (ii) *Whether the public interest is affected?*

If the answers to the above questions are in the negative, then there should be no interference under Article 226.

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. 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 on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.”

18. Keeping these principles in mind, we will now deal with the arguments advanced by Mr Jahagirdar in relation to certain terms and conditions of the tender, which according to him, are discriminatory and unreasonable. The first condition that was challenged by Mr Jahagirdar was the annual turn over criteria which stipulates that the bidder must have a minimum annual turnover of Rs.50,00,000/- during each of the preceding five years. According to Mr Jahagirdar this annual turn over is to be calculated not only from the revenue generated from the Railway catering business but also from other catering businesses, if any, undertaken by the bidder such as at airports, restaurants etc. According to Mr Jahagirdar, this would clearly show that persons who were/are exclusively catering for the Railways are put to a huge disadvantage as now other applicants who have other catering businesses and not necessarily having any experience in catering for the Railways, would not only be allowed to bid, but probably outbid the caterers who exclusively cater to the Railways. We fail to see how this condition can be termed as arbitrary, discriminatory or unreasonable. In fact, this allows others also to participate in the tender process and promotes competition. If the

Railways, in its wisdom, choose to give an opportunity and invite tenders from persons other than those who are exclusively catering for the Railways, we see nothing wrong in it. We did not think that such a decision is any way unreasonable, discriminatory or arbitrary requiring our interference under Article 226 of the Constitution of India. As mentioned earlier, to our mind, such a decision of the Railways would be in larger public interest as not only it would promote competition but would ensure participation of reputed players in the field. We, therefore, find no merit in this objection."

23. In our considered view, this legal position clinches the controversy involved in this case also. As per the law laid down in these decisions, this Court cannot strike down the terms of the tender prescribed by respondent No.1 merely because the party alleges or this Court feels that other terms in the tender would have been fair, wiser or logical. This Court can interfere only if the policy decision of incorporating these terms is arbitrary, discriminatory, malafide or actuated by bias.

24. In the instant case, no malafides as such, are alleged on part of respondent No.1. The only allegation is of arbitrariness and discrimination on the count that incorporation of these condition Nos.2 and 3, pertaining to capability and capacity may have the effect of excluding new entities from entering into contract, thereby limiting fair competition. For this submission, the learned Senior Counsel for the petitioner has placed reliance on the observations made by the Supreme Court in its decision in *Meerut Development Authority (supra)* specifically in para No. 26 as follows:

"..... The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in

cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process."

25. As a matter of fact, in our view these observations also reaffirm the legal position that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. They only make a limited judicial review available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process or were otherwise found to be discriminatory and arbitrary.

26. These observations are also required to be considered in the context of further observations made in para Nos. 27 and 28 as under:

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process."

Therefore, what is essential to be looked into by the Court in this case is whether these terms and conditions in the tender document exclude the petitioner or similarly placed entities from entering into contract or are providing to them also an opportunity to participate in the process.

27. Learned Senior Counsel for the petitioner has also placed reliance on the Judgment in the case of *Sterling Computers (supra)* wherein the same legal position is reiterated with a further rider in para 28 that,

".....Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias."

28. In the light of this legal position, within the limited scope of judicial review relating to the terms of the tender is considered, the two conditions in the tender document which pertain to eligibility criteria and as challenged as discriminatory and arbitrary need to be considered. These two conditions are as follows:

"2. The bidder shall have annual turnover of minimum 10 (ten) Crores within the last three years. Firm profit alongwith audited financial statements of last 3 years (ending 2014/15) for verification of annual turnover, Certified by Chartered Accountant, shall be attached with tender document.

3. The project profile shall prove minimum 3 years (three years) similar accident free experience of installation, Operation

and maintenance of BTS Equipment's on 180 Poles located along roads, flyovers, skywalks, subways, foot over bodies in Government/Semi-Government/Local bodies in Mumbai Metropolitan Region (MMR) area. Copy of the experience Certificate signed by the authorized person of organization not below the rank of Executive Engineer and duly attested by Gazetted Officer shall be submitted alongwith bid as per Proforma of Certificate enclosed at Section III (B) of Bid Volume I."

29. As per the petitioner, both these conditions are highly discriminatory. It is urged that considering the scope of the work involving installation of BTS equipments of poles or structures owned by respondent No.1, there is no logical reason for imposing these conditions. According to learned Senior Counsel for petitioner, as per the tender document, a bid can be made even for a single pole and hence the liability for payment of royalty or charges is comparatively negligent. Moreover, those charges or royalty has to be paid in advance for a period of one year preceding the said year. Hence, when respondent No.1 was going to receive the charges in advance from the contractor, it was absolutely unjustifiable to stipulate in the condition that the bidder should have turnover of Rs.10 Cr. within the last 3 years. According to the learned Senior Counsel for the petitioner, if the bidder is submitting his bid for a single pole, which option is available under the tender, this condition of his having a financial capability to the extent of having turnover of Rs.10 Cr. within last 3 years, is highly arbitrary and without any application of mind.

30. However, the affidavit-in-reply filed on behalf of respondent No.1 clearly makes out that the petitioner is under a misconception that

the bid can be made even for installation of BTS equipment on a single pole. It is stated in para 10 of the affidavit-in-reply that the terms and conditions incorporated in paras 2.4 to 2.9 of the tender bid make it clear that bid has to be for individual flyover in three corridors, namely, Eastern Corridor consisting of 14 flyovers (162 poles), Western Corridor consisting of 13 flyovers (180 poles) and Sion-Panvel Corridor consisting of 9 flyovers (82 poles). Therefore, even if the bidders are not bound to bid for all the 162 poles in Eastern Corridor and all the 182 poles in Western Corridor and all the 82 poles in Sion-Panvel Corridor, bid has to be for individual flyovers in all the three corridors for any number of poles of his choice.

31. The affidavit-in-reply further makes it clear that the financial liability for the bidder, who would be awarded the contract ranges from Rs.15,231/- to Rs.22,313/- per month per pole. Thus, the annual rate per pole comes to Rs.1,82,772/- to Rs.2,67,756/-. The bidder has to pay the said rate per pole to respondent No.1 upfront for the entire year. Naturally, in our view, therefore, the bidder has to be financially sound to pay the said upfront amount. The financial stability or soundness of the bidder can naturally be ascertained from his annual turnover of the last preceding 3 years. In our considered opinion, therefore, there is nothing wrong in respondent No.1 fixing the abovesaid financial criteria. Especially considering that tender is for five years, it cannot be in any way considered

as excessive, arbitrary or highly discriminatory.

32. Even as regards the criteria relating to experience, the affidavit-in-reply makes it clear that while executing the work of installing BTS equipment, the successful bidder has to take various safety precautions as the said poles are located on the flyovers/subways of MSRDC in and around Mumbai. There is constant movement of traffic on these flyovers and subways, therefore, all the safety norms referred in the tender are required to be observed by the successful bidders. It is in this background that, condition No.3 specifies that the project profile shall prove minimum 3 years similar accident free experience of installation, operation and maintenance of BTS equipments on 180 poles located along roads, flyovers, skywalks, subways and foot over bodies in Government/Semi-Government/Local bodies in Mumbai Metropolitan Region Area.

33. Again looking to the nature and the aspect of the safety, it cannot be said that this criteria, as laid down by in the tender document, is in any way disproportionate or having no nexus with the work to be conducted by the successful bidder.

34. As to the apprehension of the petitioner that, these two conditions may have the effect of excluding the new entities, like the petitioner, from raising successful bid and these conditions are laid down

tailor-made to suit only to a limited and well established entities in the Telecom Infrastructure Provider Sector, this apprehension also appears to be without any substance as affidavit-in-reply and the tender document make it clear that even new entity can participate by forming Joint Venture or in Consortium with the entities who have relevant turnover and experience. Therefore, by providing route of Joint Venture or in Consortium proper care is also taken to ensure that new entrants gain experience of performing such contract. Apart therefrom, some vague or general complaint without proper pleadings and supporting materials can hardly give rise to the above issues. The Court is not obliged to probe them further.

35. Thus, looked it at from any angle even within the limited scope of judicial review, we do not find that these two conditions, as laid down in the tender document, are in any way arbitrary or discriminatory so as to violate Article 14 of the Constitution.

36. As to the Judgment relied upon by the learned Senior Counsel for the petitioner, *Mahesh Varma (supra)*, the facts of the said authority were totally different in the sense that the pre-qualification criteria attached to technical tender was, on scrutiny by the High Court found to be unfair, unreasonable and opposed to public policy, as the said criteria made it compulsory that the manufacturers of spare parts, who are supplying their products to the Original Equipment Manufacturers (OEM suppliers), were

alone held entitled to participate in the tender. It was found that such criteria neither ensures quality nor capacity of the supplier to supply the goods tendered but only purports to create monopoly in favour of few suppliers which is not permissible in law. It was further found that OEM suppliers were having unfair advantage of quoting one price for their products to Original Equipment Manufacturers and another price to MSRTC. Moreover, there were only two to three OEM suppliers and hence the eligibility criteria fixed by the MSRTC enabled the OEM suppliers to create a monopoly or a cartel among themselves which was held to be not in the best interests of MSRTC. In the light of these facts, the said condition in the tender document was held to be discriminatory. Thus, these observations must be looked at and considered bearing in mind the nature of the contract, the goods or services tendered, the terms and conditions of the tender not having any nexus or relation with the same. Looking at the requirement of the MSRTC the terms and conditions appeared to be arbitrary and unfair so also unreasonable. Hence, the justified interference.

37. The facts of the present case, as discussed above, are totally different. The conditions, in the tender document which are impugned, are neither discriminatory nor they encouraged the monopoly nor they have the effect of creating cartel. Conversely, the conditions relating to financial capacity and capability are essential for proper performance of the

contract. They are also not found to be in any way discriminatory.

38. The petition, therefore, holds no merits and hence stands dismissed, with no order as to costs.

39. Rule, accordingly, is discharged.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]