JPP

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

WRIT PETITION (LODG.) NO. 2321 OF 2018

1. ACC India Private Limited
a Company registered under the
provisions of the Companies Act, 1956
having its registered office at 525-DLF
Tower B, Jasola, New Delhi – 110 025
and its office in Mumbai at 101, 1st floor,
Akanksha Apartments, Plot No.417,
D.K. Sandu Road, Chembur Road,
Mumbai – 400 071.

2. Aniruddha Ray, age 50 years,
Managing Director of ACC India
Private Limited and having his
Office address at 101, 1st floor, Akanksha
Apartments, Plot No.417, D.K. Sandu Road
Chembur Road, Mumbai – 400 071.

3. Arabian Construction Company
SAL (Holding), a company incorporated
under the laws of Lebanon and having its
registered office at Gefinor Centre,
Block C, Floores 1 and 2,
P.O. Box 114-5175, Beirut, Lebanon. … Petitioners.

V/s.

1. State of Maharashtra, acting through its
Department of Housing at Mantralaya,
Madam Cama Road, Mumbai – 400 032.

2. Maharashtra Housing Development Authority, acting through the Chief Officer, Mumbai Housing and Area Development Board at Grihanirman Bhavan, Kalanagar, Bandra (East), Mumbai – 400 051.

3. Capacit'e Infraprojects Limited a public company registered under the provisions of Companies Act, 1956 having its registered office at 605-607, Shrikant Chambers, 'A' Wing, 6th floor, Next to R.K. Studio, Sion Trombay Road, Chembur, Mumbai – 400 071.

4. Tata Projects Limited a Company registered under the provisions of Companies Act, 1956 having its registered office at Mithona Towers-1, 1-7-80 to 87, Prenderghast Road, Secundrabad – 500 003 and office in Mumbai at One Boulevard Street, 2nd, 3rd and 4th floor, Lake Boulevard Road, Powai, Mumbai – 400 076.

5. Citic Construction Company Limited a Company registered under the provisions of Chinese Laws and having its registered office at 22/F, Tower A, TYC Centre, C2 Dongasanhuanbeilu, Choayang District, Beijing – 100 027 China through Tata Projects Limited office in Mumbai at One Boulevard Street, 2nd, 3rd and 4th floor, Lake

Boulevard Road, Powai,
Mumbai – 400 076. ... Respondents.

Mr. Ravi Kadam, Senior Advocate a/w. Mr. Malhar Zatakia, Mr. Nilesh Tated and Ms. Saloni Shah I/b. M/s. DSK Legal for the Petitioners.
Mr. A.A. Kumbhakoni, Advocate General a/w. Mr. Hemant Haryan for Respondent 1 – State.
Mr. A.A. Kumbhakoni, Advocate General a/w. Mr. Akshay P. Shinde and Ms. Akanksha Helaskar for Respondent No.2.
Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Vishal Phal and Ms. Manali Patwardhan i/b. Kunal Damle for Respondent No.3.
Mr. R.A. Dada, Senior Advocate a/w. Mr. Y.P. Dandiwala, Mr. R.K. Satpalkar, Ms. M. Avasia i/b. M/s. Mulla & Mulla & C.B.& C. for Respondent No.4.

CORAM : R.M. Borde and
V.M. Deshpande, JJ.

DATE : 30 July, 2018.

Oral Judgment (Per R.M. Borde, J.) :-

Heard respective Counsel appearing for the parties. The Petitioner No.1 is a Company incorporated under the Companies Act, 1956 and a subsidiary of Petitioner No.3. The Petitioner is essentially objecting to the summary recorded by MHADA on 14.02.2018 thereby declaring selection of Respondent Nos. 3 to 5 as a successful bidder.

2. The present Petition relates to the global tender issued by MHADA on 03.04.2017 for the work of technical designing (structure, services + infrastructure) co-ordination and construction of rehabilitation/sale/commercial/amenities/any other structure alongwith construction of habitable temporary transit camps, work of onsite/offsite infrastructure and landscaping and performing various co-ordination activities of project and obtaining all relevant permissions and approvals from all concerned authorities, on lump-sum basis for redevelopment project of BDD Chawls on CTS Nos. 1539 and 1540 of Lower Parel Division, Worli, Mumbai. It is informed that in all four bidders submitted their E-bids online. According to the Petitioners, the details in support of their technical capacity and experience in having constructed high rise buildings have been submitted alongwith the certificates in support thereof. On 28.07.2017 the technical bids were called and on 14.02.2018 the Petitioners and the Consortium of the Respondent Nos. 3,4 and 5 was held eligible during technical evaluation. The financial bids have been opened on 31.05.2018 and the bid offered by Respondent Nos. 3 to 5 was found to be lowest and as such, they have been selected for executing the project. The Petitioners contend that they gathered the information relating to certain deficiencies in respect of the bid offered by Respondent Nos. 3 to 5, more particularly, in respect of the requisite technical capacity and experience of Respondent No. 3, in relation to constructing one high rise building

of height not less than 70 meters and atleast 175 meters above the ground level, which according to the Petitioner is incomplete and the construction is on going which has result of rendering Respondent No.3 technically disqualified and the experience as regards construction of high rise building of atleast one high rise building of 175 meters height cannot be said to have been possessed by Respondent No.3. It would be appropriate at this stage to refer to relevant qualification criteria provided in the tender document. The eligibility criteria is prescribed in the clause 2.1.17. The same is reproduced as under :-

> *"2.1.17. Eligibility Criteria*
> *To be eligible for bidding hereunder, a Bidder shall fulfill the following conditions of eligibility (the "Eligibility Criteria) :*
>
> *(A) Technical Capacity : For demonstrating technical capacity and experience (the "Technical Capacity"), the Bidder shall meet the requirements set out below under each category:*
> *I. Real Estate Projects Category : Under this category, the Bidder should have experience of at least 10 years in the development of Real Estate Project* (s) wherein the Bidder should have completed the project in all respect and incurred a cost or received payments over the last 7 years immediately preceding the Bid Due Date to the tune of :*
>
> *(i) One such project having minimum Construction Cost not less than INR 8,600 crore (Rupees Eight Thousand Six Hundred Crore).*
>
> *OR*

(ii) Two such projects having minimum Construction Cost not less than INR 5,400 crore (Rupees Five Thousand Four Hundred Crore) each

OR

(iii) Three such projects having minimum Construction Cost not less than INR 4,300 crore (Rupees Four Thousand Three Hundred Crore) each.

II. High Rise Building Category : Under this category, the Bidder should have experience in the last 7 years of construction of three high rise Buildings of height not less than 70 meters and at least one building out of which shall be of minimum 175 meters above Ground Level using either Cast in situ concrete technology with system formwork or Pre-cast Concrete technology."

Paragraph 2.1.18 relates to Submission of Bid Documents, which reads thus :-

"2.1.18 Submission of Bid Documents

(A) The Bidder shall enclose with its Bid the following documents for supporting Technical Capability in Real Estate projects:

Certificate(s) from its statutory auditors or the concerned client(s) stating the construction cost of the Eligible Project and/or payments made/received, as the case may be, for the works commissioned during the past 7 years in respect of the Eligible Projects specified in paragraph 2.1.17(A) above. In case a particular Eligible Project/job/contract has been jointly executed by the Bidder (as part of a consortium), it should further support its claim for the share in work done for that *particular Eligible Project/job/contract by producing a certificate from its auditor or the client provided the Bidder should have held a minimum of 26% equity in the consortium entity and such equity stake shall be highest among the Consortium Members, during the period for which the eligible experience is being claimed in respect of an Eligible Project. At least one eligible project under the Technical Capacity shall be satisfied by the Lead Member, i.e. at least one project satisfying requirement under High Rise Building Category or under Real Estate Projects Category, provided the balance requirements mentioned under Technical Capacity is satisfied by the other Consortium Members, and*

(B) The Bidder shall enclose with its Bid, the following for supporting Technical Capability in High Rise building Projects :

Certificate from the relevant authority/client (for whom the project undertaken) specifying the location of the project, technology used and occupation certificate / completion certificates from the concerned planning authority / statutory authority or physical completion by Client or his Architect in respect of Eligible Project/s.

In case the Bidder is proposing precast concrete technology for this project, then he should have to show the experience of High Rise building using such precast concrete technology. Further, Bidder shall present with necessary proof usage of the precast concrete technology along with the methodology that he intend to use and adapt for this project before the Technical Committee of MHADA and obtain their concurrence on all technical parameters."

3. According to the Petitioners, since the project involves construction of 98 high rise buildings in a span of 96 months it was mandatory that the bidders meet the prescribed technical capability, and experience criteria set out in the tender documents. Out of 98 high rise buildings, 10 residential buildings of height of approximately 270 meters each are required to be constructed under the project. It is thus, the contention of the Petitioner that the requirements of having experience as prescribed in the tender document is an essential and vital condition which cannot be varied or relaxed. In order to meet the eligibility criteria, the bidder shall have experience of having constructed 3 high rise buildings of height not less than 70 meters each, out of which atleast one building should have a height of 175 meters above the ground level. In support of the satisfaction of technical capacity in raising high rise building project, a bidder shall have to tender a certificate from relevant authority (for whom the project undertaken) specifying the location of the project, technology used and occupation certificate, completion certificate from the concerned planning authority/statutory authority or physical completion by client or his architect in respect of eligible project. According to the Petitioner, the Respondent Nos. 3 to 5 have in support of their technical capacity and experience in high rise building submitted following details of various Projects :-

(1) Auris Serenity, Malad (West), - 207.5 meters from ground

level ;

(2) Lodha Splendora Bhayander Pada – 102.50 meters from ground level ; and

(3) W 54, Mahim – 160.40 meters from ground level.

4. The Petitioners contend that in the month of June 2018 they came to know that one of the high rise building i.e. Auris Serenity relied upon by Respondent No.3 to substantiate its claim of having necessary capacity and experience to construct high rise building of 175 meters was in fact not yet completed and the construction is still going on. The Petitioner also claims to have tendered an application on 20th June 2018 under the Right to Information Act, 2005 seeking information as regards the basis on which Respondent Nos.1 and 2 have considered the consortium of Respondent Nos. 3 to 5 to have met the technical criteria for eligibility prescribed under the tender document. It is contended that they have not received any response to the said application. The Petitioners claim to have checked the RERA website for status of the project, 'Auris Serenity' on 5 July, 2018 and found that the construction of high rise building is still on going and the proposed date of completion was December 31, 2020 and the same has been extended to December 31, 2021. It is further contended that there is some discrepancy as regards the number of floors of the building.

The Commencement Certificate issued by the Slum Rehabilitation Authority shows that the said building has 58 upper floors. Similarly, in respect of another building, i.e. Lodha Splendora project, certain details are gathers by the Petitioner from RERA website. It is recorded on website that the said building is waiting completion. The Petitioner thus contends that Respondent Nos. 3 to 5 do not fulfill the eligibility criteria of having technical capacity and experience to undertake the project.

5. At the outset, certain dates need to be taken into account in order to consider the challenge raised by the Petitioner apart from the merits of the objection raised by the Petitioner. All the bidders submitted their E-bids online by 27.07.2017. The technical bids were opened on 28.7.2018. According to the Respondents, the documents uploaded by the tenderers were available on website for perusal since 28.07.2017. However, no objections have been raised in respect of any of the documents. The Respondent No.2 released the summary and declared three bidders including the Petitioner to have fulfilled the eligibility criteria and technically qualified, on 14.02.2018. The financial bids were opened on 31.05.2018. The Petitioners claims to have gathered the information thereafter in the month of June 2018 and has approached this Court by presenting the instant Petition on 13.07.2018. The first preliminary objection therefore has been raised on behalf of the Respondents that on

account of delay in lodging the Petition, the same shall not be entertained. Since the objections have been raised by the Petitioner in the instant Petition only after opening of the financial bid on 31.05.2018, having found that the Petitioner not eligible, in financial evaluation to get the contract, has approached this Court. A preliminary objection is also raised that the Petitioner is not eligible, to present the Petition without impleadment of other consortium partners. It is contended that it would not be in the larger public interest to cause interference at this stage and stall the tender process of such large magnitude of work and involving huge financial outlay.

6. The Petitioner has invited our attention to Clauses 2.6.2, 2.6.3 and 2.6.4 to contend that merely because the Petition is presented at late stage shall not be construed as an impediment for considering the objections raised in the Petition. It is contended that it is in the public interest for the Respondent – MHADA to verify the eligibility aspect and take appropriate decision. Paragraph 2.6.2 records that "the authority reserves the right to reject any bid and appropriate the bid security (a) if at any time, a material misrepresentation is made or uncovered." Paragraph 2.6.3 records that "in case it is found during the evaluation or at any time before signing of the Contract Agreement or after its execution and during the period of subsistence thereof, including the Works thereby granted by the authority that one or more of the qualification conditions have not been met by the bidder, or the bidder has made

material misrepresentation or has given any materially incorrect or false information, the bidder shall be disqualified forthwith if not yet appointed as the Contractor either by issue of the LOA or entering into of the Contract Agreement and if the selected bidder has already been issued the LOA or has entered into the contract agreement, as the case may be, the same shall notwithstanding anything to the contrary contained therein or in this RFQ-cum-RFP be liable to be terminated by a communication in writing by the authority to the selected bidder or the contractor, as the case may be, without the authority being liable in any manner whatsoever to the bidder or contractor, as the case may be. In such an event, the authority shall be entitled to forfeit and appropriate the bid security or performance security, as the case may be, as damages, without prejudice to any other right or remedy that may be available to the authority under the bidding documents and/or the Contract Agreement, or otherwise. In this eventuality, such a bidder shall not be permitted to joint any other selected bidder/consortium any time during the implementation of the project." Paragraph 2.6.4 records : "the Authority reserves the right to verify all statements, information and documents submitted by the bidder in response to the RFQ-cum-RFP or the Bidding Documents and the Bidder shall, when so required by the Authority, make available all such information, evidence and documents as may be necessary for such verification. Any such verification or lack of such verification, by the authority shall not relieve the bidder of its obligations or liabilities hereunder nor will it affect any rights of the authority thereunder."

7. It is thus contended that the preliminary objections raised by the Respondent – MHADA as well as the other Respondents shall not relieve the Respondent No. 1 i.e. MHADA of its obligations of scrutinizing the objections and if it is noticed that there is any material misrepresentation or that the bidder has given any materially incorrect or false information, the bidder shall be disqualified forthwith. It is contended that the power can be exercised even after the acceptance of the bid and on entering into an agreement. So far as the eligibility of the Petitioner is concerned, it is contended that the Petitioner holds 49% share in the consortium and Respondent No.3 has been incorporated as the party to the Petition by way of amendment. It is contended that even Petitioner No.1 is entitled to maintain Petition. Apart from the preliminary objection raised by the Respondents as regards entertainability of the Petition, objection raised by the Petitioner as regards the ineligibility of Respondent Nos.3 to 5 deserves to be considered and if at all the decision taken by the Respondent is found to be arbitrary or illegal or not in conformity with the tender conditions, the cognizance of the objections need to be taken. It is thus necessary to look into the objections touching eligibility of Respondent Nos. 3 to 5 raised by the Petitioners. So far as the first part of eligibility requirement that is Real Estate Projects category is concerned, same has not been

questioned by the Petitioners. So far as the part two of eligibility condition is concerned, it is mandatory that the bidder should have the experience of at least 7 years of construction of 3 high rise buildings of the height not less than 70 meters and at least one building out of which shall be of minimum 175 meters above the ground level using either Cast in situ concrete technology with system formwork or Pre-cast concrete technology. So far as the first part of part II that is 7 years experience of construction of high rise buildings not less than 70 meters is concerned, there does not appear to be any serious objection. However, the objection is only as regards construction of a high rise building which shall be of minimum 175 meters above the ground level. According to the Respondents, the objection that the building which has a minimum height of 175 meters above ground level shall be complete in all respect where as the high rise building cited by the Respondents is incomplete. According to the Respondents, it cannot be concluded, nor can it be inferred on reading the eligibility criteria prescribed under the tender document that it shall be complete in all respects. It is contended that there is subtle distinction between two Categories i.e. Category No. 1 and Category No. 2. It is contended that what is required in substance is to ascertain whether the bidder has capacity to achieve the minimum height of 175 meters construction above the ground level and the pre-condition that the building shall be complete in all respect cannot be read in the relevant term. Paragraph 2.1.18 (A) prescribes that at least one eligible project under the Technical Capacity shall be satisfied by the Lead Member i.e. at least one project satisfying requirement under High Rise Building Category or under Real Estate Projects Category, provided the balance requirements mentioned under Technical Capacity is satisfied by the other Consortium Members, The requirement of eligible project under the technical capacity shall be satisfied by the lead member and in order to demonstrate the experience, the bidder shall have to tender the document described in paragraph (B) Clause 2.1.18. The bidder shall have to enclose with the bids, for supporting technical capability in high rise building projects: certificate from the relevant authority/client (for whom the project undertaken) specifying the location pf the project, technology used and occupation certificate/completion certificates from the concerned planning authority/statutory authority or physical completion by client or his architect in respect of eligible project. In the instant matter the Respondents have admittedly tendered on record a document certifying physical completion by the client i.e. the Respondents in respect of the eligible project. It is the contention of the Petitioner that the certificate contemplated under paragraph (B) shall be of the same description i.e. the occupation certificate/completion certificate. It is contended that the principle of 'ejusdem generis' needs to be invoked.

8. The term “ejusdem generis” has been defined in Black's

Law Dictionary as follows :-

> *"(1) A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."*

The meaning of the expression "ejusdem generis" was considered by this Court on a number of occasions and has been reiterated in ***Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal.*** The principle is defined thus :-

> *"27. The Latin expression 'ejusdem generis' which means 'of the same kind or nature' is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises 'from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context'. It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication (see Glanville Williams, 'The Origins and Logical Implications of the Ejusdem Generis Rule')."*
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> *65 Earlier also a Constitution Bench of this Court in Kavalappara Kottarathil Kochuni v. State of Madras construed the principle of ejusdem generis wherein it was observed as follows : (AIR p. 1103, para 50)*

> *"50. ..... The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. it is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary."*
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> *(emphasis supplied)*
>
> *66 Again this Court in another Constitution Bench decision in Amar Chandra Chakraborty v. Collector of Excise observed as follows : (SCC p. 447, para 9)*
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> *"9. .... The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv)the general term follows the enumeration; and (v) there is no indication of a different legislative intent."*

9. The doctrine would be applicable provided that there is no indication of a different legislative intent. An endevour has to be made to find out as to whether there is any different intent which persuades us to adopt a different interpretation and to judge whether the employer/MHADA was within its rights to apply the interpretation to relevant clause and to take a decision. Apart from the language applied in clause 2.1.17 (II) read with the information that is required to be furnished in terms of Appendix I (B) and (C) indicates that interpretation applied by Petitioner cannot be

construed as an only interpretation. It would have to be examined as to whether the view adopted by the employer or the Respondent – MHADA is a possible view. Appendix I(B) mandates certain information to be furnished in case of high rise building such as the name of the project, height of the building and technology used. So also in terms of Appendix I(C). The lead bidder is required to furnish information as regards maximum value of construction works executed in any one year during the last 5 years, taking into account the <u>completed as well as the work in progress.</u> In terms of Serial No.2, the information needs to be furnished as regards value of existing commitments and on going works. The Petitioners contend that the information published by the Respondents regarding construction of high rise residential buildings comprising of 7 Podium + Eco Deck level + 54 floor + Three Fire Check Floors including overhead water tanks, lift machine rooms and underground tank, etc. Height 207.5 meters from ground level and technology used system formwork. From the details furnished in respect of the other buildings also, in proforma Appendix 1(B) at page 161 of the Petition compilation and signed by the Respondent in respect of completion of 52 storeys, total height above ground level at 207.5 meters as of the date 31st March 2017 is annexed. Our attention is invited to clause 9 to contend that estimated date of completion recorded in the document is 30.10.2017 and on the date of presentation of the bids building was incomplete.

10. The Petitioner has also relied upon certain information gather from the RERA website and it is contended that the proposed date of completion declared on the RERA website is 31.12.2020 and the revised proposed date of completion is 31.12.2021. It is thus contended that apart from the discrepancy as regards the number of floors of the building, the high rise building is incomplete and as such the Respondent Nos. 3 to 5 shall be declared as ineligible to participate in the process since they do not fulfill the eligibility criteria.

11. According to the Respondents what is material is to find out whether the bidder has the capacity to raise a structure above 175 meters. It is contended that even the RERA website indicates that the project work in respect of (1) Excavation, (2) number of Basements and Plinth, (3) number of Podiums, (4) Stilt floor, (5) number of slabs of super structure is complete to the extent of 100%.

12. Our attention is also invited to a certificate issued by the Slum Rehabilitation Authority on 17th October 2013 and more particularly, the endorsement thereon recorded on 1st June 2017 which records the C.C. is further extended for wing A from 55th to 58th upper floors including OHT and LMR for full height and re-endorsed for wing B from 26th to 35 floors for full finishing work and further extended for wing B from 36 to 58th upper floors including OHT and LMR for full height as per amended approved

plan dated 01.06.2017. It is thus contended that there is discrepancy in number of floors. The high rise building is yet incomplete.

13. As has been recorded above, we are afraid whether the principle which has been relied upon by the Petitioners to contend that the relevant clauses in the tender agreement are required to be read in such a manner as to infer that the high rise building shall be complete in all respect is acceptable. It appear that there is an indication contrary in terms of the contract and that there is no specification that the building must be complete in all respect. The intention of providing the relevant clause is to ensure that a bidder has capacity to raise the structure upto the height of 175 meters and above. So far as the other conditions incorporated in the tender agreement, even the part of the condition (ii) in paragraph 2.1.17 has not been questioned.

14. In the matters relating to the award of contract by a public authority, the Court must be satisfied that there is some public interest involved in entertaining such petition and if the dispute is purely between the two tenderers, the Court must be very careful to see if there is an element of public interest involved in the litigation. Therefore, unless the Court is satisfied that there is a substantial amount of public interest involved or the transaction is entered into is malafide, the Court should refrain to exercise powers under Article 14 of the Constitution of India when allegations made or dispute is

between the two bidders. The scope of judicial review in the tender matters have been considered by the Supreme Court in the matter of ***Tala Cellular V/s. Union of India reported in (1994) 6 Supreme Court Cases 651***. What is required to be seen is as to whether the State decision/action is in consonance with Article 14 and the decision making process is transparent. As laid down by the Supreme Court the principle of judicial review would apply in the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State and it is expected to protect the financial interest of the State. Herein, in the instant matter the Respondent No.2 which is a public body has the right to refuse the lowest or any other tender. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power. However, if the power is exercised for any collateral purpose, the exercise of that power will be struck down. Supreme Court has observed in paragraphs 77 and 94 as quoted below :-

> *77. The duty of the court is to confine itself to the question of legality. Its concern should be :*
>
> *1. Whether a decision making authority exceeded its powers ?*

2. Committed an error of law,
3. committed a breach of the rules of natural justice
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

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

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

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. V. Secretary of State for the Home Department ex Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention."

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 quasiadministrative 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.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

15. In the matter of ***Fertilizer Corporation Kamgar***

Union (Regd.), Sindri V/s. Union of India (1981) 1 SCC 568. The Supreme Court has observed that if the Government acts fairly, though falters in wisdom, the Court should not interfere. In the words of the Apex Court "if the Directorate of a Government Company has acted fairly, even if it has altered in its wisdom, the Court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with norms of procedure set for it by rules of public administration." As has been observed in the matter of ***Asia Foundation and Construction Ltd. V/s. Trafalgar House Construction (I) Ltd., (1997) 1 SCC 738***, that the judicial review of contractual transactions by Government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. There is a need to allow for certain flexibility in administrative decision making. The decision can be challenged only on the Wednesbury principle of unreasonableness i.e. unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset.

16. In ***Jagdish Mandal v/s. State of Orissa (2007) 14 SCC 517***, the Supreme Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the decision is bona fide and taken in the public interest, the superior courts should refrain from exercising their power of judicial review.

In the present case there are no allegations of malafides and the Appellant and the Respondent consortium has offered better revenue sharing to the employer. In ***Afcons Infrastructure Ltd. V/s. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818,*** it is observed in paragraphs 13 and 15 as quoted below :-

> *"13. … a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.*
>
> *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 is mala fide 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 be tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."*

17. The Court dealing with the tender matters and while considering the question of acceptance of an offer on due consideration of the terms of the tender, the views adopted by the employer shall not be substituted by the views of the Court. The

Courts are not vested with the Appellate jurisdiction and do not seat in Appeal for the decisions rendered by the employer. As has been recorded by the Division Bench of this Court in the matter of ***Reliance Energy Ltd. V/s. MSRDC Ltd. And Ors. (2007) 5 Mah LJ 768,*** "....... Suffice it to note that even on interpretation of terms, there are divergent views. The treatment to the Items is different at the hands of the officials and outside Experts. Once the divergent views have been noted by the Tendering Authority and it took the final decision after due consideration of the same, we are nobody to substitute their views with ours and thereafter alter their ultimate decision. That is not permissible and would be beyond the parameters of judicial review. We feel that it is not necessary to enter into any larger controversy." As has been recorded in the same judgment, the Courts do not exercise the Appellate power and sit in judgment over the authority of the experts.

18. In the instant matter after due consideration the Respondent No.2 has taken decision based on interpretation of the relevant clause of tender document and held the consortium of Respondent Nos 3 to 5 eligible. The said decision can not be said to be manifestly incorrect or arbitrary or mala fide. It also cannot be said that interpretation applied to relevant eligibility clause is so inherently improbable so as to attract 'Wednesbury Principle'. In these circumstances, to reconsider the decision of the Respondent authority would tantamount to exercise the Appellate powers by this

Court and it may not be permissible.

19. The learned Counsel appearing for the Petitioners has vehemently contended that it is necessary to provide level playing field to all the bidders and necessity to indicate norms and benchmarks with clarity so as to ensure legal certainty with necessity to satisfy test of reasonableness. According to the Petitioners the legal certainty is an important aspect of the rule of law which is the heart of the parliamentary democracy or when there is the vagueness or the subjectivity in the norms specified it may result in unequal and discriminatory treatment and violate the doctrine of level playing field. Reliance is placed on the ***Reliance Energy Ltd. And Anr. V/s. Maharashtra State Road Development Corporation Ltd. And Ors. (2007) 8 SCC 1***. It is contended that the terms of the tender shall be clear and unambiguous so as to provide 'level playing field' to the parties and cannot be interpreted in any manner to bestow the advantage on some of the parties. In paragraph 36 of the judgment, the Supreme Court was observed that the standards applied by the Courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of non-discrimination. However, it is not a free-standing provisions. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to right to life. It

includes "opportunity". As held in the latest judgment of the Constitution Bench of nine Judges in I.R. Celho v/s. State of T.N., Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

20. Relying on observations in paragraph 38 of the judgment it is contended that legal certainty is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of level playing field. In the instant matter it has not been demonstrated that nor is it acceptable that the terms and conditions recorded in the tender document to which our attention is invited is either vague or subjective. The interpretation put by the Petitioners differ from the interpretation applied by the employer. The Petitioner has waited till opening of financial bids and when it was found that offer by Petitioner was not financially competitive has opted to file instant Petition. This Court does not exercise the Appellate Jurisdiction in undertaking the scrutiny of decisions taken in contractual matters. As regards the matter of award of contract and interpretation of the terms of tender document applied by the employer, the view adopted appears to be reasonable and proper. It has not been demonstrated before us that the decision taken is mala fide.

21. Under these circumstances, considering the limited

scope available for judicial review in the matters relating the acceptance or rejection of tender offer, the contentions raised by the Petitioners does not deserve acceptance.

22. This takes us to the preliminary objections raised by the Counsel appearing for the Respondents. Thought it is rightly contended that the Petitioner has approached this Court at a belated stage since we have dealt with the merits of the contentions, even if the Petition is presented belatedly, we do not find it appropriate, considering the magnitude of the project and the public interest involved in executing the project, to throw out the Petition without examining the merits of the objections. There are certain other aspects also. The E-bids were presented online on 27.07.2017. On 28.07.2017 the technical bids were opened and the documents uploaded by the each of the bidder were available for perusal by all. Because of certain intervening litigation initiated by one of the tenderer whose technical bid was not found to be accepted, the recording of summary by Respondent No.2 was deferred and it was declared only on 14.02.2018. The financial bids were opened on 31.05.2018. The Petitioner preferred to wait until the opening of the financial bids. It is the contention of the Respondents that the Petitioner had taken chances and since his financial bid was not found to be competitive has approached this Court. The delay attributable to the Petitioner reflects its intentions. Since the

Petitioner's bid was not found to be competitive, it approached belatedly, so as to take a chance and such a move shall have to be discouraged. An objection raised on behalf of Respondent No.2 – MHADA that the Petition founded by invoking Article 14 of the Constitution is not entertainable and that Article 19 is not available to an entity or an individual which is not established in India or a citizen of India, need not be entertained for the reason that the Petitioner No.1 ACC India Pvt. Ltd. has 49% shares in the consortium and is a company registered in India. Apart from this, merely quoting certain provisions in the title of the Petition does not change the complexion of the Petition. The objection raised in that regard is not worthy to be considered.

23. At the last, we deem it proper to record that it would be in the larger public interest not to cause interference in the matter and stall or delay the project of such a huge magnitude. The project is for extending the benefit to the residents of chawls and the structures are admittedly in dilapidated condition. The project which is meant to provide housing to a large public shall not be stalled and there is no element of public interest involved in causing interference. As has been recorded above, there are no malafides alleged nor it has been demonstrated that the decision making process is vitiated by arbitrariness. In the circumstances, it would surely be not in the larger public interest to cause any interference as has been considered by the Apex Court in the matter of ***Raunaq***

International Limited v/s. I V R Construction Ltd. Reported in 1998 LawSuit(SC) 1139. Placing reliance in the Judgment of ***Paharpur Cooling Towers Limited and Anr. V/s. Bangaigaon Refinery and Petrochemicals Limited and Ors. reported in ILR (1994) II Delhi 254***, it is contended that since the requirement to adhere to the eligibility condition is an essential condition of the tender, the strict literal compliance thereof shall have to be insisted upon and in the matters of non-essential conditions those can be deviated. On interpretation of the terms and on consideration of the explanation tendered on behalf of the Respondents, we do not find that there is any deviation from the essential terms. The view canvassed by the Petitioners is not acceptable. If it is a matter of interpretation, the interpretation adopted by the employer while undertaking a decision making process is not liable to be questioned as has been recorded in above quoted paragraphs of this judgment.

24. For the reasons recorded above, no interference is called for. The Petition is devoid of substance and does not deserve favourable consideration. The Petition stands rejected.

(V.M. Deshpande, J.) ***(R. M. Borde, J.)***