

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2018

CORAM

THE HONOURABLE **MR.JUSTICE R.MAHADEVAN**

W.P.No.20406 of 2018
and
W.M.P.Nos.23989 to 23991 of 2018

Shamsons Polymers Pvt. Limited
rep.by Managing Director
Mr.Deepak Batra

... Petitioner

Vs

- 1.Tamil Nadu Textbook and Educational Services Corp.
rep.by its Managing Director,
having its office at
No.68, EVK Sampath Maaligai,
DPI Campus, College Road,
Chennai, Tamil nadu -600 006.
- 2.The Managing Director,
Tamil Nadu Textbook and Educational Services Corp.
No.68, EVK Sampath Maaligai,
DPI Campus, College Road,
Chennai, Tamil Nadu -600 006.
- 3.The Director General
CSIR Central Leather Research Institute,
having its office at
Anusandhan Bhawan
2, Rafi Marg, New Delhi – 110 001.
- 4.The Director,
CSIR Central Leather Research Institute,
Sardar Patel Road, Adyar,
Near IIT Madras, Chennai,
Tamil Nadu 600 020.

5.Dr.K.J.Shreeram

Technical Manager,
CSIR Central Leather Research Institute,
Sardar Patel Road,
Adyar,
Near IIT Madras, Chennai,
Tamil Nadu 600 020.

6.Manjeet Kapoor

Proprietor,
M/s.Manjeet Plastic Industries,
30/56, West Punjabi Bagh,
New Delhi – 110 026.

(R6 impleaded as per the order of this Court
dated 28.08.2018 in WMP.No.25867 of 2018)

7.Charanpaaduka Industries Pvt. Limited

rep.by its Director,
Rajesh Gupta
11/371, 1st Floor, Sunder Vihar,
Paschim Vihar, New Delhi – 83.

(R7 impleaded as per the order of this Court
dated 28.08.2018 in WMP.No.25925 of 2018)

8.M/s.M.B.Rubber Pvt. Ltd

rep.by its Director Vipin Mehta
No.195, Gagan Vihar,
Delhi – 110 051.

(R8 impleaded as per the order of this Court
dated 14.09.2018 in WMP.No.26122 of 2018)

9.H.B.Rubber Shoes Pvt. Ltd

rep.by its Authorized representative
195, Gagan Vihar,
Delhi – 110 092.

(R9 impleaded as per the order of this Court
dated 14.09.2018 in WMP.No.27025 of 2018)

.... Respondents

Petition filed under Article 226 of the Constitution of India to issue a
Writ of Mandamus, to direct the respondents 1 and 2 to consider the

technical bid of the petitioner strictly as per the provisions of the tender document bearing RC.No.1119/C1/2018 dated 06.04.2018 and the Tamil Nadu Transparency in Tenders Act, 1998 and Rules 2000 and also permit the petitioner to participate in the price bid.

Petitioner	:	Mr.P.S.Raman, Sr.C for M/s.Adeesh Anto
R1 & R2	:	Mr.S.T.S.Murthy, AAG assisted by Mr.M.C.Munusamy, SGP
R3 to R5	:	Mr.T.Ravikumar
R6	:	Mr.AR.L.Sundaresan, Sr.C for Mr.K.Newlin Frederick
R7	:	Mr.Sathish Parasaran, Sr.C for Mr.R.Palaniandavan
R8	:	Mr.Avi Singh
R9	:	Mr.Bajbai Mr.Shreyas Dharmadhikari

ORDER

This writ petition has been filed for a mandamus directing the respondents 1 and 2 to consider the technical bid of the petitioner strictly as per the provisions of the tender document bearing RC.No.1119/C1/2018 dated 06.04.2018 and the Tamil Nadu Transparency in Tenders Act, 1998 and Rules, 2000 and also permitting the petitioner to participate in the price bid.

2. In nutshell, the case of the petitioner is as under:

2.1 The 1st respondent, who is the statutory body to procure footwear for school students, has been floating tenders from 2012 onwards for supply of shoes to Tamil Nadu Government, aided and nominated schools. Accordingly, they floated a tender for supply and delivery of Velcro sandals to school children in Tamil Nadu on Annual Rate Contract for the year 2018-19 for supply of 59.09 lakhs pairs of footwear, vide RC.No.1119/C1/2018 dated 06.04.2018, fixing the period of submission of the tender documents on all working days between 10.00 am to 5.00 pm from 06.04.2018 to 08.05.2018. A pre-bid meeting was scheduled to be held on 20.04.2018, which was also duly held. The release of minutes was restricted by the office of the respondents 1 and 2 only to technical clarifications with ulterior motives. Totally, 14 bidders including the petitioner participated in the tender. Out of the 14 participants, 10 had experience and amongst the 10, the sample of the petitioner alone was not rejected in 2016-17 either at pre-dispatch or post delivery samples testing. As their samples failed the test in 2017-18, the petitioner had taken extra care in preparing the samples and the same was sent to the 3rd respondent for testing, who had given their clearance report by letters dated 26.04.2018 and 04.05.2018, signed by the 5th respondent. The

petitioner submitted their tender documents on 09.05.2018 along with the above letters. The office premises/manufacturing units of all the participants were inspected by the 1st respondent and such inspection of the petitioner's premises took place on 07.06.2018. Though cartelization is not permissible, the petitioner based on some information, intimated the same to the 2nd respondent vide letter dated 28.05.2018.

2.2 The petitioner in the first week of July 2018, came to know about the cartel amongst 5 bidders and feared the same result as in 2017-18. Immediately, they sent a communication dated 07.07.2018 in this regard. However, the 2nd respondent failed to issue any clarification, despite Rule 17 of the Tamil Nadu Transparency in Tenders Rules, 2000 (for brevity, "the Rules"). The petitioner upon meeting the 2nd respondent, came to know that the decisions are taken by the Tender Scrutiny Committee. The steps taken by the petitioner to meet the Principal Secretary also ended in vain and the petitioner on 11.07.2018 learnt that following 6, out of 14 bidders, have qualified for their commercial bid to be opened: (1)M/s.M.B.Rubber Private Limited; (2)M/s.Manjeet Plastic; (3)M/s.Charan Paduku Private Limited; (4)M/s.Today Footwear Private

Limited; (5)M/s.Liberty Shoes Limited; and (6)M/s.H.B. Rubber Pvt Ltd. The 1st and 2nd respondents have opened the commercial bids on 11.07.2018 without any notification, as the tender condition in clause 4.23.2 does not prescribe for any notification to unqualified bidders and as per the tender conditions, there is no provision to notify and notification was to be issued only to the eligible tenderers. After learning about the opening of commercial bids and about the quote of L1, which was minimum at 180, the petitioner approached the 2nd respondent vide letter dated 10.07.2018 and also sent representations dated 18.07.2018 and 19.07.2018 to the first, third, fourth and fifth respondents. A reply by way of e-mail, was sent by the 3rd to 5th respondents stating that the report was based on additional parameters. The petitioner thereafter approached the MSME Technology Development regarding the main parameters of the sandals, who sent a reply dated 25.07.2018 stating that the flexing resistance and abrasion are most important parameters governing the durability of the footwear.

2.3 Alleging that there is a loss of Rs.30 crores to the exchequer; technicalities were created to reject the tender of the petitioner without notice to them; the introduction of additional

parameters in violation of the tender document is illegal and unjust; the tender process was not conducted in a transparent manner; Rule 32A of the Rules was violated, as the result of the technical bid was not communicated; the 3rd to 5th respondents not being accredited with NABL ought not to have been the selected laboratory, despite there being various allegations against them; the Central Vigilance Commission (CVC) guidelines in office order No.72/12/04 dated 10.12.2004 has been violated; the procedure to send the sample for testing is illegal as it has been done away by the CVC whenever safeguards and specifications are provided as in the instant case; the procedure is adopted to non-suit the petitioner, who is capable to delivering the product within a specified time at much lower rates; the report of the petitioner has been manipulated by the 3rd to 5th respondents at the instigation of the 1st and 2nd respondents as the same samples were earlier cleared by the 3rd to 5th respondents; the formation of cartel has not been addressed by the 1st and 2nd respondents and the entire procedure is in violation of the Tamil Nadu Transparency in Tender Rules; and since the rejection of the technical bid has not been communicated, the respondents have also violated the principles of natural justice, the petitioner has filed the present writ petition for appropriate directions.

3. During the pendency of this writ petition, the impleading petitions filed by the 6th and 7th respondents were allowed on 28.08.2018 and the impleading petitions filed by the 8th respondent and the petitioner were allowed on 14.09.2018. All the respondents have filed their respective counters.

4. In reply to the averments made in the writ petition, the case of the 1st and 2nd respondents, as per their counter, is that the petitioner being an unsuccessful tenderer, cannot question the process with a *mala fide* intention; the writ petition has become infructuous as the technical bids and price bids were opened already and the letter of acceptance was also issued to the successful bidders vide RC.No.1119/C1/2018 dated 07.08.2018 after getting the approval of the Board of Governors of the Tamil Nadu Textbook and Educational Services Corporation (TNTB & ESC); the reply/amendment of queries was uploaded in the website on 05.05.2018; a Sub-Committee (Technical Committee and Finance Committee) to scrutinize the tender was formed as per G.O.Ms.No.75 School Education (TRB) Department, dated 23.04.2018, the samples were sent for testing to Central Leather Research Institute (CLRI) and the report was received on 18.06.2018, based on the report and the recommendation of the

Tender Scrutiny Committee, the price bids were opened and evaluated as per the tender document and the Letter of Acceptance was issued on 07.08.2018; the petitioner, who did not raise any objections, when his sample was accepted by the same CLRI for the year 2016-17 and when the same was rejected for the year 2017-18, cannot now question the choice of laboratory or the report; the petitioner has been levied with penalties in earlier years for the delay in supply and in 2015-16, about 17,947 pairs of Footwear were rejected by CLRI in post delivery inspection; the tender document itself contained the provision of testing of samples and it was clearly mentioned that the price bid of a tenderer, whose technical bid fails, shall not be opened; the field inspection does not grant any right and is not related to testing of samples; the office memorandum of CVC dated 15.10.2003 is only directory and not mandatory; it is not necessary for one State to follow the process in another State; unique codes were given to the samples without disclosing the names of the tenderers and sent to CLRI, who, in turn gave unique codes before sending it to the Laboratories to preserve secrecy; the reports given by the petitioner also disclose that he has failed in the "Abrasion Resistance"; the clarification of queries is to be restricted only to tender document as per Rule 17 which has been misunderstood by the petitioner; as per

Tender Clause 4.23.2, only the qualified bidders are to be notified regarding the opening of the price bid and the price bid of qualified bidders were disclosed to all of them; the petitioner has failed to follow the conditions for redressal of grievance in Clause 5.15 of the tender document by approaching the Board of Governors; the additional parameters were issued along with the tender documents in Annexures I to X to ensure quality footwear to the students of Government and aided schools; the petitioner was only making baseless allegations without substance and did not seek any clarifications; Rule 32 A of the Rules is not applicable as the 'Two Cover System' has been followed; it is not mandatory to send the samples for retesting in National accreditation Board for Labs (NABL) accredited Labs and the present system of sending it to third party is followed from 2014-15 onwards; there is no collusion between the respondents and the opportunity to raise clarifications as per the tender documents was given to the petitioner; having accepted the tender document, participated and submitted a declaration form in Annexure XV, the petitioner cannot challenge the process; having failed in the sample test and having failed to challenge the lab report, the petitioner cannot sustain the writ petition; the petitioner has no locus standi to question the credibility of the expert opinion; the technical specifications are tested in two

methods namely, ISO (International Organization for Standardization) and SATRA (Shoe and Allied Trades Research Association) and hence, there cannot be any comparison between the report submitted by the petitioner and the official report; the procedure contemplated under the Tamil Nadu Transparency in Tenders Rules was meticulously followed. As such, the respondents 1 and 2 sought for the dismissal of this writ petition.

5. A rejoinder has been filed by the petitioner mainly contending that the Board of Governors failed to act in accordance with the tender conditions; till date the technical bid of the petitioner has not been rejected; a rejection report would not entitle the respondents to automatically reject the tender; there is no exclusion in the tender bid for participation in the next stage; the report does not permit the use of word 'good' or 'pass' or 'fail' or 'reject'; unless the order of rejection is communicated to the petitioner, it is not possible for the petitioner to file an appeal under Section 11 of the Rules, unless the order of rejection is communicated; the tender processing authority has failed to follow Section 12 of the Tamil Nadu Transparency in Tenders Act, 1998 (for brevity, "the Act"); the field inspection can be taken only for the technically qualified tenderers; the existence of the

cartel has been ignored by the tender committee by citing the cases of M/s.M.B.Rubbers Pvt. Ltd and M/s.H.B. Rubbers Private limited and the consideration of the technical bid of M/s.H.B Rubbers Private Limited, despite not having experience; the report of the 3rd to 5th respondents is vitiated for various reasons including non-testing of all the samples, mishandling of the samples, and testing was not properly done; the bids of the cartel of M/s.M.B.Rubber Pvt Ltd, M/s.Manitoba Plastic Industries and M/s.Charan Paaduka Industries Pvt Ltd for the supply of schools bags were defeated, when the samples were sent to NTC testing lab; the writ petition has been filed immediately after the communication dated 24.07.2018; just because the samples were earlier voluntarily sent by the petitioner to the 3rd respondent, it does not mean that the petitioner cannot challenge them; the circular of CVC dated 15.10.2003 has not been followed; the tender process has not been transparent and the 1st and 2nd respondents have maintained secrecy; the 3rd sample declared to be passed by communication dated 04.05.2018 was the same sample submitted along with the bid; Clause 5.15 is not applicable for rejection of technical bid and it is only Section 11; as per Rule 32-A, it is necessary to notify each tenderer whether or not it has been pre-qualified and shall give the reasons upon request; and the failure to provide the specifics of accredited

laboratory must have been mentioned in the tender conditions. Thus, according to the petitioner, they are entitled to the reliefs as claimed herein.

6. The main contentions raised in the common counter of the 3rd, 4th and 5th respondents are that since no relief is sought against them, the writ petition as against them is to be rejected; they are independent bodies with internal and external vigilance mechanisms to ensure transparent and accountable practices in confirmation with the guidelines laid down by the CVC; the samples along alphanumeric blind codes were only received by them, which, in turn was given different codes before sending it for testing; the capacity of the 3rd respondent was not disputed by the petitioner in earlier years and there were never any allegations against the CSIR-CLRI; the petitioner only voluntarily requested for testing of four properties of the sample i.e for Hardness, Density, Flexing Resistance and Abrasion Resistance of the sandals and failed in Abrasion Resistance in two samples i.e Velcro Sandals, Sizes 8 & 9, whereas, the 1st respondent had given 32 parameters to be tested in four broad categories; a mail was given on 24.07.2018 indicating that in the report dated 26.04.2018 it was never indicated that the requirements of the 1st respondent which had 32

parameters were satisfied; specific methods are followed to test the samples which are procured for specific requirements; only the parameters specified in the tender document were tested; the accreditation by SATRA is equal if not higher to the NABL method as SATRA are specific to Footwear and compliant to both ISO (international) test methods and EN (European Union Standards) test methods; and the writ petition has been filed with baseless allegations against the institute and the 5th respondent. Hence, the writ petition has to be dismissed as devoid of merits.

6.1 In reply to the same, the petitioner has filed a rejoinder mainly claiming that all the samples were not tested; there is no information about accreditation for 2018-19; the report cannot contain remarks like good, very good or satisfactory; and there is no disclosure about the complaints of Sri Ram Sales and also has pointed out the deficiencies in the new lab.

6.2 Mostly, the contentions are allegations against the 3rd to 5th respondents. In reply, the 3rd to 5th respondents have stated that they have conducted the tests as per the tender document; the testing as per Annexure VIII carried out on multiple samples and average result has been given; the samples of the petitioner did not meet all the 32 parameters of the 1st and 2nd respondents; and appropriate

accreditation was received from SATRA. A copy of the certificate was also enclosed.

7. The 6th to 9th respondents have filed their respective counters in the similar line taken by the 1st and 2nd respondents, in addition to explaining the history of the laboratories and the tender evaluation process stating about the declaration of 6 to 8th respondents in the respective categories, as they complied with all the norms. According to them, the 3rd respondent was fully qualified to be accredited; the report obtained voluntarily outside the purview of tender cannot have any force; the tender conditions were not designed to suit any one; the sample testing has been in vogue for all the years and having participated, the petitioner being an unsuccessful participant, cannot challenge the tender conditions or the procedure of sending the sample to the 3rd respondent; the specifications have been in vogue from 2017-18 and are part of the tender documents for 2018-19; there was no cartelization; the quoting of the price of the respondents in their representation even before the opening of the price bid is highly objectionable; the petitioner without filing any appeal cannot sustain this writ petition; there is no condition in the tender to disclose the status of the companies; the 8th and 9th

respondent companies are independent identities with their own factories and have been in existence for several years; the 9th respondent has quoted different prices for all the categories and also submitted the necessary documents to show their experience; the 1st to 5th respondents have followed the prescribed procedures; no additional parameters were introduced; the 8th respondent has complied with all the requisite conditions; since the petitioner's tender has been rejected, they have made baseless and unsustainable allegations against the successful bidders and the Government authorities, which ought to be rejected.

7.1 In reply, the petitioner has filed separate rejoinders as similar to the one filed to the counter of the 1st and 2nd respondents, in addition stating that though there have been negotiations before finalization of the tender, the market value was not determined; the amount of Bank Guarantee was finalized much earlier; only Laboratories with ISO: 17025 certificate can conduct the tests; the very fact that the 9th respondent has chosen not to challenge his omission from the price bid itself establishes the existence of cartelization and collusion between the parties; and the non-communication of the rejection of the technical bid has vitiated the

entire process. Hence, they prayed to grant the reliefs as sought in this writ petition.

8. Mr.P.S.Raman, learned Senior Counsel appearing for the petitioner has painstakingly contended that the entire design of the tender, the selection of the expert panel namely the 3rd respondent with mentioning about the accreditation, the inclusion of the additional parameters and the inaction of the 1st and 2nd respondents against the various queries and complaints, clearly illustrate the collusion between them and the successful bidders. In support of the same, he has relied upon Clauses 4.4, 4.20, and 4.21 of the tender conditions. The learned Senior Counsel, relying upon Clause 4.17, contended that despite the fact that the petitioner complying with all the requirements in the clause for supply to both boys and girls, his technical bid was rejected. It was also contended by him that the procedure to pre-test the sample is unwarranted, when specifications are particularly given as instructed by the CVC in their memorandum dated 15.10.2003 and breeds to corruption, which was also addressed by the CVC in their office Order No.72/12/04. The learned Senior Counsel further referring to Clause 4.22.3 of the tender conditions, contended that verification of the site can be plausible only for bidders whose technical bid is

accepted and therefore, as the petitioner's site was inspected on 07.06.2018, the petitioner must be permitted to participate in the price bid. Placing reliance on the CLRI reports dated 26.04.2018 and 04.05.2018, he contended that the reports if read together, would reveal that the samples sent by them satisfied the parameters and the rejection of the very same sample by the 3rd respondent is on the instructions of the 1st and 2nd respondents in collusion with the successful bidders. It was also contended that the 3rd respondent not accredited with NABL, ought not to be the institution, to which the samples are sent as the complaints against them are pending. Further, a scathing attack was made by the learned Senior Counsel on the 3rd to 5th respondents regarding the procedures and the methods followed in conducting the tests as improper and also that the report was given without testing all the samples in all the categories. He further contended that the rejection of the technical bid after the inspection and based on the report of the 3rd respondent is illegal; the common report of the CLRI cannot be relied upon; no opportunity was given to assail the rejection and no reasons have been adduced in the returns for such rejection. Added further, since the rejection was never communicated to enable the petitioner to file an appeal in terms of

Section 11 of the Act, the petitioner could not file the appeal. The learned Senior Counsel also contended that Clause 5.15 of the tender document is not applicable; and relied upon Section 10 to contend that acceptance or rejection of the tender must be communicated to the parties as per Sections 10(6) and 10 (7) of the Act; and Rule 32A of the Rules framed there under. Referring to Section 12, the learned Senior Counsel contended that there must be an exercise to ascertain the market value and if the price is higher even after negotiations, the Tender Accepting Authority must reject the same. According to him, in the instant case, the market value has not been ascertained and there is also a loss to the exchequer as the prices quoted are high. Added further, the learned Senior Counsel contended that the 1st and 2nd respondents not only failed to take any steps against cartelization, but also failed to provide the clarifications as contemplated under Rules 17 and 27. It was also contended by the learned Senior Counsel that the tender process was not transparent manner, but rather it was secretive and fraudulently the Letter of Acceptance was given to the 6th to 8th respondents. In view of the fact that the entire procedure stood vitiated, the learned Senior Counsel sought for the consideration of the price bid of the petitioner along with others, as it would save the exchequer of nearly Rs.30 Crores and pressing into aid the Division

Bench decision of the Chhattisgarh High Court in W.P.No.(C)239/2016, sought for re-evaluation of the technical bid of the petitioner, by allowing this writ petition.

9. Per Contra, Mr.S.T.S.Murthy, learned Additional Advocate General appearing for the 1st and 2nd respondents contended that the petitioner after participating in the tender, cannot challenge the process and being an unsuccessful bidder, he has no locus standi. It was also contended by him that since the tender process including the issuance of letter of Acceptance was issued on 07.08.2018, the prayer in the writ petition has become infructuous. Relying on clause 4.23.2, the learned Additional Advocate General emphasized that as per the said tender condition, it is necessary to only intimate the qualified bidders regarding the opening of the price bid. He further relying upon the other tender conditions, pointed out that about 32 parameters are to be satisfied and it is only based on the report of the 3rd to 6th respondents, that the petitioner's technical bid was rejected. As per the report, the sample did not meet the requirements in all the parameters. The learned Additional Advocate General also referring to Clause 5.15 of the tender condition, contended that an appeal shall lie to the Board of Governors against any decision and the petitioner

instead of approaching the appellate authority, has straight away approached this Court. He further contended that the petitioner was aware of the tender conditions and technical bid compliance and therefore, did not seek any clarification regarding the tender documents. Hence, Rule 7 is not applicable. Drawing the attention of this Court to Rule 27, the learned Additional Advocate General contended that while processing tender evaluation, secrecy has to be maintained. He also contended that it is only after relying upon Rules 8 and 28, the 1st respondent was entitled to engage the services of any consultant and pre-sample testing is permitted under law; the guidelines of CVC is only directory and not mandatory; it is a policy decision and the 3rd respondent has been the choice for the past three years; the petitioner whose samples were cleared in 2016-17 and rejected in 2017-18, for which, did not raise any objections, cannot now question the credibility and qualification of the 3rd respondent. It was urged by the learned Additional Advocate General that there is no malpractice, malafide, arbitrariness or cartelization; the site visit would not confer any right to a person who has failed in the technical bid; the samples were tested as per the procedure by maintaining utmost secrecy; the samples were sent by assigning a code without specifying the name to the 3rd respondent, who in turn assigned another code

and therefore, the allegation of malpractice is without any substance. Added further, it was also contended by him that the decision of the expert body ought not to be interfered with, as all the conditions of the tender document have been followed. The learned Additional Advocate General further contended that the petitioner has made baseless allegations against the 1st and 2nd respondents only to sustain the writ petition. In support of his contentions, the learned Additional Advocate General relied upon the following judgments:

- (i) Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others [(2000) 5 SCC 287]
- (ii) Jagdish Mandal v. State of Orissa and others [(2007) 14 SCC 517]
- (iii) Michigan Rubber (India) Limited v. State of Karnataka and others [(2012) 8 SCC 216]
- (iv) Municipal Corporation, Ujjain and another v. BVG India Limited and others [(2018) 5 SCC 462]

10. Mr.T.Ravi Kumar, learned counsel appearing for the 3rd to 5th respondents submitted that the petitioner has no locus to challenge the qualification or accreditation of the 3rd respondent. Further, after having voluntarily submitted the samples for testing, the petitioner cannot turnaround and question the credibility of the 3rd respondent. The learned counsel also submitted that the 3rd respondent is accredited with SATRA, which is valid; and the petitioner having

remained silent, when he was awarded the contract for 2016-17 and when the contract was denied as they failed in the technical bid in 2017-18, cannot challenge the procedures followed by the 3rd respondent. According to him, all the samples were tested with utmost secrecy by giving unique codes and hence, there is no question of any malpractice or arbitrariness. The learned counsel also pointed out that earlier the petitioner had only requested for the samples to be tested under 4 parameters, whereas the tender document has 32 parameters given in Annexures I to X of the tender notification. Therefore, relying upon the report and the contentions made in the counter, he contended that the samples of the petitioner failed the required technical specifications and a report to that effect was sent. Further, all the tests were properly conducted and a reply dated 24.07.2018 was also mailed to the petitioner. The learned counsel also submitted that the 3rd respondent has not been implicated in any case as alleged and hence, sought for the dismissal of this writ petition.

11. Mr.ARL.Sundaresan, learned Senior Counsel appearing for the 6th respondent contended that an unsuccessful party cannot challenge the selection; the due process has been followed and the expert has rejected the same as it does not satisfy the requirements.

The learned Senior Counsel further contended that since the technical bid of the petitioner has failed, his request to open the price bid cannot be considered. Relying upon Rules 10 and 11, he contended that the appeal under Rule 11 is only when an order is passed regarding the acceptance or rejection of the tender when the final price is fixed. Even otherwise, since the factum of rejection of their sample was within their knowledge, they ought to have filed the appeal within 10 days as per Rule 11. Further, as per Rule 27 confidentiality has to be maintained. The learned Senior Counsel also relied upon Clause 4.21 to contend that the said clause specifically provides for testing of samples as determined by the Corporation and the rejection of the samples would amount to automatic disqualification; by following due process, the sample of the petitioner was tested like that of the sample of other bidders; since the sample of the petitioner failed the specifications, the same was rejected; and the earlier report obtained privately cannot be relied upon when the samples submitted with the application were rejected after failing in the tests. The learned Senior Counsel further contended that the petitioner having not objected to the conditions, cannot raise any voice against the same after failing the technical bid. Since the sixth respondent had satisfied the criterion, the letter of acceptance was given to him. It was also contended that

since the petitioner themselves had wrote letters regarding the price bid, they were aware of the rejection of their technical bid. Placing reliance on the Judgments in (i)Asia Foundation & Construction Limited v. Trafalgar House Construction (I) Limited and others [(1997) 1 SCC 738]; (ii)Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and others [(2016) 8 SCC 446] (iii)Chennai Metropolitan Water Supply and Sewerage Board, Chennai v. M/s.Khrunichev State Research and Production Space Centre, Chennai and another [2004 SCC OnLine Mad 691 : AIR 2005 Mad 149 (Division Bench of this Court)]; and (iv)judgment of the Division Bench of this Court dated 12.06.2018 passed in W.A.Nos.137 and 138 of 2017, the learned Senior Counsel sought the dismissal of this writ petition.

12. Mr.Satish Parasaran, learned Senior Counsel appearing for the 7th respondent, in the same lines as that of the other respondents, contended that the 7th respondent had satisfied all the required norms and has been in the business for several years. The petitioner, who is an unsuccessful bidder, cannot challenge the selection. He further submitted that the supply is for the educational institutions and the beneficiaries are the school students. The learned Senior Counsel

further contended that the petitioner without original pleadings along with the writ petition, cannot improve his case and take different stands in the reply. According to him, the case of the petitioner would not fall under any of the limited circumstances warranting judicial review in the matter of contracts. Pointing out to para 17 of the judgment relied upon by the petitioner, the learned Senior Counsel contended that the said judgment is not applicable to the present facts. Thus, he sought to dismissed this writ petition.

13. Mr.AVI Singh, learned counsel appearing for the 8th respondent has placed his arguments adopting the arguments of the other Senior Counsels and in addition, would contend that when the application of the bidders and the samples satisfy the tender conditions, there is no impediment for the authorities to accept the tender. Further, since the product of the petitioner which was submitted along with his bid, has failed in the tests, the same has been rightly rejected; and the petitioner being a failed candidate, has no locus to sustain the writ petition. The learned counsel would further contend that the theory of cartelization is false and baseless. Relying upon the following judgments, it was contended that the scope of judicial review is limited in contractual matters, unless arbitrariness or perversity or favoritism is shown:

(i) Air India Limited v. Cochin International Airport Limited and others [(2000) 2 SCC 617;

(ii) Michigan Rubber (India) Limited v. State of Karnataka and others [(2012) 8 SCC 216]

(iii) Central Coalfields Limited and another v. SLL SML (Joint Venture Consortium) and others [(2016) 8 SCC 622]

(iv) Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and another [(2016) 16 SCC 818]

(v) Pasumpon v. Vaigai Van Urimaylargal Ottunargal Sangam [2006(3) CTC 810] (Division Bench of this Court)

(vi) Ion Exchange Waterleau Limited v. The Commissioner, Madurai [order of this Court dated 28.04.2008]

(vii) Socio Economic and Educational Development Trust v. The Commissioner, Tirunelveli [order of this Court dated 09.06.2008 in WP.No.2986 of 2008]

(viii) Uflex Limited v. State of Tamil Nadu and another [Order of this Court dated 29.06.2011 in WP.No.8090 of 2011]

(ix) M/s. Divya Impex v. State of Tamil Nadu [Order of this Court dated 10.03.2016 in W.P.No.922 of 2016 etc batch of cases].

Thus, the learned counsel prayed for dismissal of this writ petition.

14. Mr.Bajbai, learned counsel appearing for the 9th respondent would contend that there is no merits in the claim of the petitioner; and the 9th respondent had been in operation from 1990 onwards and they had submitted all the documents to reflect their experience. The learned counsel would further contend that just because they have not chosen to challenge the decision of the authorities for not including their name along with other eligible bidders for price bid, it cannot be said that there is collusion or cartelling. According to the learned counsel, there is no requirement under the tender to disclose the personal relationship and that since each company is a separate entity, there was no legal impediment. Under such circumstances, the learned counsel adopting the arguments of the other counsels, sought for the dismissal of this writ petition.

15. Heard all the counsels and perused all the materials.

16. The point for determination in the case on hand is, whether there is any scope for this Court to extend the arm of judicial review in the award of the contract to the 6th to 8th respondents?

17. Before going into the facts of the case and the terms and conditions of the tender and the provisions of the Tamil Nadu Transparency in the Tenders Act, 1998 and the Rules framed thereunder, it is profitable to have a cursory view of the settled legal position on the scope of judicial review.

18. (i) In *Municipal Corpn., Ujjain v. BVG India Limited* (supra), the Supreme Court has held as follows:

"39. In Montecarlo Ltd. v. NTPC Ltd. (2016) 15 SCC 272, this Court highlighted the freedom of the owner to decide in matters of tenders as follows: "26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have

referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly, in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints." (emphasis supplied)

46. As held in *Tata Cellular v. Union of India* (1994) 6 SCC 651, the terms of the tender are not open to judicial scrutiny as the invitation to tender is a matter of contract. Decisions on the contract are made qualitatively by experts. *M/s Eco Save Systems Private Limited* [respondent no.2 in Civil Appeal arising from SLP (C) No. 11967/2016] is a project consultant and technical advisor of the Ujjain Municipal Corporation. It provides technical consultancy and advisory services. The documents produced along with the counter affidavit filed by respondent no.2 would show that respondent no.2 is an expert in municipal solid waste management.

64.1 Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.3 It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint.

(ii) In *Michigan Rubber (India) Limited v. State of Karnataka* (supra), it has been observed by the Supreme Court as follows:

"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 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 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 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 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, the 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."

(iii) In *Monarch Infrastructure (P) Limited v. Commissioner, Ulhasnagar Municipal Corporation and others (supra)*, at para 11, it has been held by the Supreme Court as follows:

"11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's

action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide."

(iv)The Division Bench of this Court in Chennai Metropolitan Water Supply and Sewerage Board, Chennai v. M/s.Khrunichev State Research and Production Space Centre, Chennai (supra), has observed as follows:

"37. In this context, before going into the rival contentions, we feel it appropriate to refer to the decision of the Honourable Supreme Court reported in "1994 (6) SCC 651 (TATA CELLULAR versus UNION OF INDIA)", in particular paragraph No.94, wherein, the scope of power of judicial review in such cases has been succinctly set out, which reads as under:

"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."

38. The said decision has also been subsequently followed by the Honourable Supreme Court in "(2001) 2 SCC 451 (W.B.STATE ELECTRICITY BOARD versus PATEL ENGINEERING CO.LTD. AND OTHERS)". Further, in 2001 (2) SCC 451, the Honourable Supreme Court has also stated as to the importance of the rules, instructions and tender conditions in the award of contract where internationally competitive bidding was made. In paragraph No.24 of the said judgment, the Honourable Supreme Court has stated the legal position as under:

"24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by

the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."

53. Even in public interest, we are convinced that no such relaxation could have been shown by the second respondent on its own in the absence of any specific notification by the State Government prior to the submission of the bids by the petitioner exempting it from providing necessary EMD. We also find support from the decision of the Hon'ble Supreme Court reported in "2004 (2) CTC 221(DIRECTORATE OF EDUCATION AND OTHERS versus EDUCOMP DATAMATICS LTD., AND

OTHERS)", wherein the Hon'ble Supreme Court has held in para 12 to the following effect.

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its points 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."

(v) In *Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited (supra)*, the observation of the Supreme Court runs thus:

"12. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be

rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straight away. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.

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

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

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to

be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(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';

(ii) Whether public interest is affected.

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

20. We have seen that the present tender has not gotten off the ground since May 2015, and one year's precious time has been wasted due to

litigation between the parties. We must hasten to add that the Government of Gujarat is partly to blame for this inasmuch as it arrived at a minimum wage figure and did not disclose the same to the tendering parties twice. Even in the second round of litigation, the Government did not disclose the newly arrived at minimum wage figure of Rs.2,91,00,000/- to the two persons in the fray before us. Ordinarily, therefore, we would have asked the Government to disclose the second figure of minimum wage and restart the tendering process. However, we do not think that the justice of the case requires us to do so, for two reasons. First and foremost, Respondent No.1 before us has clearly violated the strict terms of the tender condition on every occasion and hence cannot be given relief. And, secondly, we already find that due to litigation the present tender has not taken off for over one year. In the absence of malafides, and indeed the High Court judgment has found that malafides did not vitiate the calculation of minimum wage by the Labour Department, we cannot accept Shri Divan's submission that the figure of Rs.2,91,00,000/- was tailor made to suit the bid offered by the Appellant herein. We, therefore, set aside the decision of the Gujarat High Court and allow the Government to proceed further in finalizing the tender in favour of the Appellant herein."

(vi) In *Asia Foundation & Construction Limited v. Trafalgar House Construction (I) Limited* case (supra), the Supreme Court ultimately, opined as follows:

"11. This being the position, in our considered opinion, High Court was not justified in interfering with the award by going into different clauses of the bid document and then coming to the conclusion that the terms provided for modification or

corrections even after a specified date and further coming to the conclusion that respondent no.1 being the lowest bidder there was no reason for the Port Trust to award the contract in favour of the appellant. We cannot lose sight of the fact of escalation of cost in such project on account of delay and the time involved and further in a coordinated project like this, if one component is not worked out the entire project gets delayed and the enormous cost on that score if re-bidding is done. The High Court has totally lost sight of this fact which directing the rebidding. In our considered opinion direction of re-bidding in the facts and circumstances of the present case instead of being in the public interest would be grossly detrimental to the public interest."

(vii) In the Tamil Nadu Police Housing Corporation Limited v. M/s.P&C Projects (P) Limited (supra), the Division Bench of this Court has observed as under:

"32. The combined effect of the judgments of the Hon'ble Supreme Court in Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others reported in (2016) 8 SCC 622, Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited and others reported in (2018) 3 SCC 13, West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 SCC 451 and Goldyne Technoserve Ltd., Vs. State of Madhya Pradesh and others reported in AIR 2011 SC 2574 would go to show that it is not for the Court to substitute its own opinion as to the relevancy of the tender conditions. If the Tender Evaluating Authority had rejected the bids on the ground that they are not in strict compliance of the requirement of the tender conditions, this Court cannot substitute its own

reasons to nullify the rejection on the ground that the deficiencies are either trivial in nature or are capable of rectification by providing an opportunity.

33. On the question of judicial review, the Hon'ble Supreme Court has time and again pointed out that this Court sitting under [Article 226](#) exercising its power of judicial review cannot and shall not interfere with the orders of the Administrative Authorities on substituting its own findings. In *Central Coal Fields Limited and another Vs. SLL-SML (Joint Venture Consortium) and others* reported in (2016) 8 SCC 622, the Hon'ble Supreme Court had, while dealing with the powers of the judicial review observed as follows:

"Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/ procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted."

36. In the light of the above law, laid down by the Hon'ble Supreme Court, in various decisions cited *supra* we are constrained to conclude that the learned Single Judge was not right in going into the nature of the conditions and the violations. We are of the considered opinion that whether the bidder/ tenderer should be given an opportunity to correct the mistakes or the bid should be rejected at the stage of technical evaluation itself for non-compliance with the tender conditions is a matter which is solely within the purview of the Tender Evaluation Committee and this Court cannot substitute its own reasons.

39. We therefore, find that the reasons that prevailed upon the Tender Evaluation Committee for

rejecting the tenders cannot be interfered with unless it is shown that they are not bonafide. The learned Single Judge had taken into account, the price bid and had after noticing the fact that the price bid of the respondent tenderer is less than the L1 tenderer, had concluded that it will be in the public interest to give an opportunity to the respondent tenderer to participate in the further process. As already pointed out, while discussing the scope of judicial review of such actions the Honble Supreme Court had pointed out that the Court cannot go into the merits or otherwise of the decision, but it is the decision making process which will have to be looked into.

40. Admittedly, the technical bids of the tenderer/ the respondent were rejected even before the price bids were opened. Therefore, the Authorities had no clue of the price bid of the respondent tenderer at the time when they rejected the technical bid. Hence, we are unable to accept the said submission on behalf of the respondent based on the actual price bids which were subsequently opened.

41. In view of the above reasons, we are constrained to interfere with the order passed by the learned Single Judge. In view of the subsequent decisions of the Hon'ble Supreme Court which deviate from the position of law as was laid down in B.S.N.Joshi and Sons Ltd., Vs. Nair Coal Services Ltd., and others reported in (2006) 11 SCC 548, we find that the judgment of the learned Single Judge deserves to be set aside and the same is accordingly set aside. The appeals are allowed, however, in the circumstances there will be no order as to costs. Consequently, the connected miscellaneous petitions are also closed."

(viii)The Supreme Court in Afcons Infrastructure Limited v.

Nagpur Metro Rail Corporation Limited (supra), has held as follows:

"13. In other words, 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 the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

(ix) In *Air India Limited v. Cochin International Airport Limited* (supra), in para 7, it has been held by the Supreme Court, which reads as under:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *R.D. Shetty v. International Airport Authority*, 1979 (3) SCC 488; *Fertilizer Corporation Kamgar Union v. Union of India*, ; *Asstt. Collector, Central Excise v. Dunlop India Ltd*, , *Tata Cellular v. Union of India*, ; *Ramniklal N. Bhutta v. State of Maharashtra*, and *Raunaq International Ltd. v.*

I.V.R. Construction Ltd., . 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 of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

(x) In *Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)* (supra), the Supreme Court has observed thus:

"33. *In Ramana Dayaram Shetty v. International Airport Authority of India* (1979) 3 SCC 489 this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage:

"7. It is a well-settled Rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary Rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable."

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of- participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in *Tata Cellular v. Union of India* (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in

respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular) in *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517 in the following words:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

(17 of 28) [CW-4891/2017] This Court then laid down the questions that ought to be asked in such a situation. It was said:

"22. ... 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";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference Under [Article 226](#)."

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

(xi) This Court in *M/s. Divya Impex v. State of Tamil Nadu* (supra), has observed as follows:

"10. Following the principles and the ratio laid down by the Supreme Court in the above decisions, it can be stated herein that the terms and conditions in the tender are prescribed by the Board bearing in mind the nature of contract and, in such matters, the authority, calling for the tender, is the best judge to prescribe the terms and conditions of the tender. Further, the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Board 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, merely because it feels that some other terms in the tender would have been fair, wiser or logical. The Board 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. In addition, in the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters."

"25. It is the prerogative of the Tender Calling Authority to impose pre-qualifying conditions in the tender process and therefore, the petitioner has no right to question the fixing of pre-qualification as the respondents have got every right and power to fix the pre-qualifications to suit the standards and

performance of the materials to be produced. While issuing the tender notification, the procedure contemplated under the Tamil Nadu Tender Transparency Act, 1998 and the Rules made thereunder were followed by the respondents and no hideouts were played. Therefore, the contentions of the learned senior counsels for the respective petitioners that with malafide intention, the eligibility criteria has been stipulated cannot be sustained. As such, the petitioners have not made out any ground which warrants interference by this Court with the conditions stipulated in the General Terms and Conditions of the tender notification dated 11.12.2015."

(xii) In *Uflex Limited v. State of Tamil Nadu* (supra), this Court has pointed out thus:

"11. In this context, it is quite relevant to refer to Rule 17 of the Rules, which reads thus :

"17. Clarification to tender documents.-

(1) At any time after the issue of the tender documents and before the opening of the tender, the Tender Inviting Authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change to all those who have purchased the original tender documents and upload corrigendum for the information of those who have downloaded the tender documents from the website.

(2) In case any one tenderer asks for a clarification to the tender documents before 48 hours of the opening of the Tender, the Tender Inviting Authority shall ensure that a reply is sent and copies of the reply to the clarification sought shall be communicated to all those who have purchased the tender documents without identifying the source of the query and upload such clarification to the designated website for the information of those who

have downloaded the tender documents from the website, without identifying the source of the query."

13. Therefore, in this case, the Tender Inviting Authority, namely, the second respondent after the issue of the tender documents and before the opening of the tender, is empowered to issue the corrigendum, amending or altering the experience clause, which is, accordingly, issued. Also, the said corrigendum issued is communicated to all the prospective bidders, including the petitioner, who purchased the tender document from the office of the second respondent and the same is uploaded in the website.

17. In matters of tenders, the duty of the court is to confine itself to the question of legality. Its concern should be :

Whether the Tender Inviting Authority -

- 1. 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 fulfilment 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 are : (i) Illegality; (ii) Irrationality; and (iii) Procedural impropriety. Further, The principles deducible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are :

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

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

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

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

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

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

The above are the principles laid down by a Three Judge Bench of the Supreme Court in Tata Cellular's case cited above. In the very same judgement, the power of Judicial Review has been examined by the Supreme Court, wherein it has been held that if the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to

protect private interest at the cost of public interest or to decide contractual disputes. Therefore, restraint under judicial review is always limited to this Court and it has to be invoked rarely and hesitantly under [Article 226](#) of the Constitution of India.

*18. Moreover, the terms of the contract are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise 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 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. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision making process, the Court has to necessarily exercise its discretionary powers under [Article 226](#) with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest. This is the law laid down by this Court in the cases of *Ion Exchange Waterleau Ltd.* and *P.Ramadas*, cited *supra*."*

(xiii) This Court in *Ion Exchange Waterleau Limited v. The Commissioner, Madurai* (supra), has observed as under:

"19. Needless to say, it is a settled principle that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise 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. In the decision in *Tata Cellular* case, the Constitution Bench of the Supreme Court has authoritatively held that the principle of judicial review in the matter of contract 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. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State and the power to refuse the lowest or any other tender is always available to the Government. 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. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision-making process, the Court has to necessarily exercise its discretionary powers under [Article 226](#) with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest

in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest.

20. The learned Senior Counsel appearing for the petitioner has placed heavy reliance on the decision of the Supreme Court in the New Horizons case wherein it was categorically held that the validity of the action of the Tender Evaluation Committee in not considering the tender submitted by the tenderer has to be considered in the light of the principle laid down in Tata Cellular case. Here, what is to be considered is, when the condition regarding previous experience in the tender notification was not fulfilled, whether the action of the Tender Accepting Authority in rejecting the petitioner's Technical Bid, can be regarded as arbitrary and unreasonable. In this regard, it is to be noted that the tenderer has been required in [Section 2.2 \(b\)](#) of the Bid Document to substantiate his previous experience with documentary proof and also to furnish credentials in the said field. In New Horizons case, it was held that a tender is not liable to be excluded from consideration on the ground of non-eligibility on account of lack of past experience and that when the tenderer fails to furnish with the tender, the required material by way of credentials of the past experience, the decision of the Tender Evaluation Committee to exclude the tender from the consideration was therefore not warranted by the terms and conditions for submission of the tender as contained in the tender notification. Whereas, in the instant case, admittedly, there is a specific clause, viz., [Section 2.2\(b\)](#) of the Bid Document which requires the tenderers to have the past experience in similar work. In other words, in New Horizons case, though the Supreme Court has held so as stated above, it should be seen that there was no specific clause in the tender notification to

the effect that the tenderer should have past experience which is not so in the case on hand inasmuch as, there is a specific clause to that effect, as referred to earlier. Thus, while giving anxious consideration to the ruling of the Supreme Court in New Horizons case, I am of the considered view that the facts and circumstances involved in this case are not akin to those in New Horizons case and as such, the said decision can, in no way, be of any help to the petitioner. Similarly, though it is held by the Supreme Court in the Reliance Energy case relied on by the learned Senior Counsel appearing for the petitioner that the doctrine of "Level Playing Field" is entitled to be invoked, it is clarified in the very same judgment that the said doctrine is subject to public interest and in this case, as the petitioner has not fulfilled the qualification criteria prescribed in Section 2.2(a) to (e) of the Bid Document, it is not entitled to claim the benefit of the doctrine of "Level Playing Field" the reason being that the aspect of public interest is very much involved in the matter. In such view of the matter, this judgment also can be of no avail to the petitioner for the reason that the petitioner has failed to satisfy the requirements prescribed in Section 2.2(a) to (e) of the Bid Document."

(xiv) In *Pasumpon v. Vaigai Van Urimaylargal Ottungargal*

Sangam (supra), the Division Bench of this Court has held thus:

"12. From the above decisions of the Hon'ble Supreme Court, we could deduce that any award of contract, whether it is by a private party or a public body or a State in their commercial transaction the concerned body can choose its own method to arrive at its rates to be charged for the terms to be fixed. The scope of interference with such fixation of rates and terms is very limited and borrowing the expression of the learned Judges of the Supreme Court themselves that only in extreme cases where it is demonstrated that extreme arbitrariness or the

decision is based on mala fides or in case of hostile discrimination, the Writ Court exercising its discretionary power under Article 226 of the Constitution of India, could be invoiced. It has also been held that even when some defect in the decision making process is found, the Court should act with great caution and should not interfere in a casual manner. It has also been held in the above decisions that public interest should be paramount and the Writ Court should always keep in mind the larger public interest in order to decide whether any interference is called for."

(xv) In *Socio Economic and Educational Development Trust v. The Commissioner, Tirunelveli* (supra), the observation of this Court at paras 20 and 21, run thus:

*"20. The decisions cited by the learned counsel for the petitioner are of no avail to the petitioner, whereas the decisions relied upon by the respondents have much relevance to the case on hand and applying the ratio laid down therein, the case of the petitioner has to be rejected. If the petitioner is aggrieved over the decision of the first respondent accepting the tender of the third respondent, she should have appealed the same to the Government within 10 days from the date of receipt of the order under Section 11 of the Tamil Nadu Transparency in Tenders Act, which remedy is not exhausted by her. In *S.Selvarani v. The Commissioner, Karaikudi Municipality, Karaikudi's* case (referred to above), the Supreme Court has categorically held that the highest bidder can claim no right to have his tender accepted. Even in the case of *R.Kumar v. Chief Engineer, Mettur Thermal Power Station, Mettur Dam* (cited supra), this Court has held that the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender and the terms of the invitation to tender are not open to judicial scrutiny, the same*

being in the realm of contract. The Corporation 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 Court 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 Court cannot strike down the terms of the tender prescribed by the Government, merely because it feels that some other terms in the tender would have been fair, wiser or logical. The Corporation 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. In addition, in the matter of policy decisions or exercise of discretion by the Government, so long as the infringement of fundamental rights is not shown, Court will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. When the Council of the first respondent found the third respondent suitable in all respects for the execution of the work, the writ petitioner, who has not satisfied the requirements according to the tender notification, will have no say that she, being the highest bidder, has to be awarded the contract. Highest bidding alone is not sufficient for awarding the Government contract, but fulfilment of the conditions is also equally important. If the conditions are ignored, the execution of work may not be qualitative, resulting in sub-standardness, which cannot be allowed.

21. The Supreme Court has laid down the proposition in various rulings that scope of judicial review in the matter of tender is limited and the only scope is to examine as to whether the decision making process of the tender inviting authority is vitiated by arbitrariness, unfairness, illegality, irrationality or unreasonableness. When the decision

is proper and it is made in accordance with the law contemplated and there is no procedural impropriety, this Court cannot interfere with the same, that too in the absence of any arbitrariness or unreasonableness. Therefore, the petitioner has not made out any case to show that there is arbitrariness in rejecting her bid, which rejection had, in fact, come to be made only for not satisfying the requirements of the contract. However, since the learned counsel for the petitioner has made a consistent plea that the representation of the petitioner giving details is though not materially placed before this Court has been made to the respondents 1 and 2 and the same is pending, it is open to the respondents 1 and 2 to consider the representation of the petitioner and pass appropriate orders on merits and in accordance with law. One more contention that the petitioner has quoted the highest bid amount and therefore she has to be awarded the contract does not hold good, for the reason that though fetching higher revenue is a matter of importance in the tender process, the awarding of contract should not be at the cost of other conditions."

19. From the aforesaid catena of judgments of the Supreme Court and also this Court, it is limpid that there is limited scope for this Court to intervene in matters involving the award of contracts. Normally, this Court cannot sit in appeal over the decisions of the expert body. The long arm of this Court can be extended only when there is arbitrariness, favoritism, perversity, *mala fides*, irrationality and when any act is against public interest. The question of equity is alien in the matter of contracts.

20. Now, let us examine whether the case agitated by the petitioner falls within the ambit of judicial review. Concededly, the petitioner has failed in the technical bid. The petitioner's samples have been rejected by an expert body, which is the very same body, which has been in vogue for three years. For the year 2016-17, the petitioner's samples tested by the same body for the supply of footwear to the students of the Government and aided schools in Tamil Nadu were accepted and hence, the contract was awarded. But, for the year 2017-18, the samples of the petitioner failed and hence, they were shunted out from price bid. It is the very own case of the petitioner that to avoid the same result as in 2017-18, improvements were made in the product. When the samples of the petitioner, which were submitted along with his technical bid for 2018-19, were sent for testing with the 3rd respondent, the expert body has reported that the samples are not in compliance with the required specifications. Therefore, his price bid has not been opened.

21. The petitioner has claimed that the very same 3rd respondent who cleared the petitioner's samples by letters dated 26.04.2018 and 04.05.2018, has now declared that the petitioner has failed in the test. It has been contended by the petitioner that the

concept of pre-qualifications to the price bid in the form of technical bid or appraisal has been done away as per the circular of the CVC dated 15.10.2003. For better appreciation, the contents of the circular are extracted hereunder:

"1...

2. While it is recognized that samples may be required to be approved to provide a basis in respect of indeterminable parameters such as shade, feel, finish & workmanship for suppliers of such items, but system of approving/rejecting tender samples at the time of decision making is too subjective and is not considered suitable, especially for items which have detailed specifications. The lack of competition in such cases is also likely to result in award of contracts at high rates.

3. It is thus advised that Government Departments/Organisations should consider procurement of such items on the basis of detailed specifications. If required, provision for submission of an advance sample by successful bidder(s) may be stipulated for indeterminable parameters such as, shade/tone, size, make-up, feel, finish and workmanship, before giving clearance for bulk production of the supply. Such a system would not only avoid subjectivity at the tender decision stage but would also ensure healthy competition among bidders and thus, take care of quality aspect as well as reasonableness of prices.

4..."

22. A perusal of the above circular would indicate that it is only directory. It only indicates that specifications must be given and even contemplates that advance samples can be collected. Section 13 of the

Act and Rules 32 and 32A of the Rules also enable the Tender inviting authority to prescribe pre-qualifications or in other terms, a technical bid before the price bid. The Rules also make it clear that only persons who clear the technical bid, shall be eligible for financial bid. The appropriate clause in the tender is clause 4.21, which reads as follows:

"4.21 Sample Testing for Tender Evaluation:

a) The Tenderer while submitting the tender documents shall submit three samples of Footwear (Velcro Sandal) in each category for Boys and Girls separately manufactured as per the technical specifications in the Tender document. The samples shall be tested by the Corporation in any of the accredited laboratory. The testing of such samples submitted by the Tenderer shall be conducted to check whether the quality, size and dimension of the samples are in conformity with the technical specification prescribed in the tender document.

b) The following tests of the samples of the Footwear (Velcro Sandal) shall be conducted by one of the accredited laboratories.

(i)The quality tests in respect of the samples.

(ii)Whether the quality, colour, shade, size, measurement and fabric weight of the samples are in conformity with the Technical specifications and other test parameters prescribed in the Tender document.

c) The Corporation reserves the right to test the samples at its discretion and in the event of failure of the samples in the test, the tender shall be summarily rejected and the price bid of such tender shall not be opened."

Thus, sub clause (c) makes it clear that it is the discretion of the Corporation to send the test for samples and in the event of failure of the tests, the price bid of such tenderer shall not be opened.

23. As held in the various judgments referred above, it is the prerogative of the State or the body inviting tender to prescribe for pre-qualifications. Such prescription of pre-qualifications in itself cannot be termed as arbitrary or breeding ground for corruption, but rather it is only in public interest that the quality or the specification must be meted out. Such pre-qualifications in the form of technical bid are prescribed as necessary. The petitioner has accepted the said terms and conditions and participated in the tender. Even according to the petitioner, he has been participating in the tender with pre-condition for several years. His samples, as already stated, were subjected to test by the 3rd respondent itself on earlier occasions. The petitioner is therefore, estopped from challenging the procedure as contemplated under the tender conditions. In any case, having failed to specifically challenge the terms and conditions of the tender, the petitioner has no locus standi to sustain the writ petition on this ground.

24. The next bone of contention of the petitioner is that CLRI is not qualified and it is not accredited with NABL. The petitioner has also contented that accreditation from SATRA is not permissible and the methods followed are improper and therefore, the samples must have been sent to some other institute. This Court is not in consonance with such contention as it is the discretion of the Tender Inviting Authority to choose the expert as per the Rules and the Tender Conditions. It is not for the petitioner to state as to who should be expert or the method to be deployed for testing the samples. The methods of testing must be left open to the experts. The Apex Court in **Sajesh Babu K. v. N.K.Santhosh, [(2012) 12 SCC 106]** held as follows:

"15. From the above discussion, it is clear that in terms of the guidelines, the Selection Committee consisting of three experienced persons assessed the ability of the candidates with reference to the answers for their questions and awarded marks. In the absence of any allegation as to mala fide action on the part of the selectors or disqualification, etc. interference by the High Court exercising extraordinary jurisdiction under Article 226 of the Constitution of India is not warranted.

16. To strengthen the above proposition, it is useful to refer to a decision of the Constitution Bench of this Court in University of Mysore v. C.D. Govinda Rao [AIR 1965 SC 491] . The issue therein relates to one Anniah Gowda to show cause as to under what authority he was holding the post of a Research Reader in English in Central College, Bangalore. After considering the pleadings of both the parties, consultation by an expert and the stand of the

university, this Court set aside the order of the High Court and dismissed the writ petition filed by the respondent therein. While considering the said issue, the following conclusion of the Constitution Bench as to the opinions expressed by the experts and interference by the Court is relevant. It is seen that in para 13 of the judgment, the Constitution Bench has noted that the High Court has criticized the report made by the Board and rejecting the criticism of the High Court in such academic matters, held as under: (AIR p. 496)

"13. ... We are unable to see the point of criticism of the High Court in such academic matters. Boards of Appointments are nominated by the universities and when recommendations made by them and the appointments following on them are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about mala fides against the experts who constituted the present Board; and so, we think it would normally be wise and safe for the courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than the courts generally can be."

17. In a recent decision of this Court in *Basavaiah v. H.L. Ramesh* [(2010) 8 SCC 372 : (2010) 2 SCC (L&S) 640] wherein a similar issue, namely, recommendations of the Expert Committee and evaluation as well as judicial review under Article 226 of the Constitution was considered by this Court. The short question involved in that case was that whether the appellants therein (Dr Basavaiah and Dr Manjunath) were qualified to be appointed as Readers in Sericulture? One Dr H.L. Ramesh, the respondent in both the appeals therein challenged the appointments of both the appellants on the ground that they were not qualified for the post of Readers in Sericulture. The learned Single Judge, on

11-10-2004, after examining the pleadings and scrutinizing the arguments of the parties dismissed the writ petition filed by Dr H.L. Ramesh, the respondent in WP No. 24300 of 1999. Dr H.L. Ramesh, aggrieved by the said judgment, preferred a writ appeal before the Division Bench of the High Court. The writ appeal was allowed and the appointments of the appellants therein were set aside leaving it open to the University of Mysore to make fresh selection in accordance with the law. The appellants, aggrieved by the said judgment, filed special leave petitions before this Court. In the High Court as well as in this Court, the University filed affidavit stating that the Expert Committee consisting of highly qualified five distinguished experts evaluated the qualification, experience and the published works of the appellants and found them eligible and suitable. In such circumstance, this Court observed in paras 20 and 21 as under: (Basavaiah case [(2010) 8 SCC 372 : (2010) 2 SCC (L&S) 640] , SCC p. 378)

"20. It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinized the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinized the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.

21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an

Expert Committee consisting of distinguished experts in the field. In the instant case, the experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture."

18. It is clear that in a matter of appointment/selection by an Expert Committee/Board consisting of qualified persons in the particular field, normally, the courts should be slow to interfere with the opinions expressed by the experts, unless there is any allegation of mala fides against the experts who had constituted the Selection Committee. Admittedly, in the case on hand, there is no allegation of mala fides against the three experts in the Selection Committee. In such circumstances, we are of the view that it would normally be wise and safe for the courts to leave the decision of selection of this nature to the experts who are more familiar with the technicalities/nature of the work. In the case on hand, the Expert Committee evaluated the experience certificates produced by the appellant herein, interviewed him by putting specific questions as to direct sale, home delivered products, hospitality/service industry, etc. and awarded marks. In such circumstances, we hold that the High Court ought not to have sat as an appellate court on the recommendations made by the Expert Committee."

25. From the above extract, it is crystal clear that this Court cannot sit in appeal over the decisions of the expert body, unless it is

found that there has been some arbitrariness or mala fide. The terms and conditions are common to all participants. That is not disputed. The samples were sent with unique code by the 1st respondent and another code has been assigned by the 3rd respondent to preserve secrecy. This Court is satisfied with the procedure and holds that under these circumstances, there is no scope for any malpractice. The contention that images could have been sent by what's app is presumptive and hence, rejected. Yet another contention of the petitioner that all the samples were not put to test, is also rejected in view of the stand taken by the 3rd respondent that all the samples were tested. At this juncture, it is needless to state that the technical bid can be deemed to be passed only if all the parameters are satisfied as it is implied in the terms and conditions.

26. The petitioner could not substantiate that the particular expert was chosen to favour the awardee respondents, because, the petitioner itself accepting the credibility, sent their samples to the 3rd respondent voluntarily for testing. Unfortunately, it had sought the samples to be tested only under 4 parameters, whereas the tender conditions prescribed for 32 parameters. As stated supra, the petitioner not only lacks locus to challenge the choice of expert, but

also is estopped from doing so. Therefore, this Court is of the opinion that there is neither arbitrariness nor malafide in the actions of the experts.

27. It was also contended on behalf of the petitioner that additional parameters were prescribed behind the back of the petitioner. This Court is again constrained to reject this contention as the tender documents specifically state about Annexures I to X, which prescribe the specifications. Clause 4.3 of the Tender conditions speaks about Bid Documents. But, for the submission of the particulars along with the application by the petitioner, the application itself would be rejected. The contention of the petitioner that the clarification ought to have been given within 48 hours also does not hold water, because the tender conditions were similar to the previous year and self explanatory. There was never any modifications. Hence, there is no violation of Rule 17, as alleged by the petitioner.

28. It is also pertinent to mention here that the petitioner who had made allegations without any materials, itself had claimed to have had an informer, who not only leaked information about rejection of its technical bid, but also about the price quoted by other participants.

Hence, this Court is of the opinion that the petitioner has not come to this Court with clean hands.

29. The next plank of contention of the petitioner was regarding the language employed in clause 4.22. According to him, it is only after technical qualification, site visit can be made and since the site visit has been conducted, the petitioner's price bid must also be opened. Though such an argument advanced on the side of the petitioner is fanciful, it does not reflect the correct position. Clause 4.21 talks about Sample Testing for Tender Evaluation and Site Visit falls under Clause 4.22, which does not state, when the site visit to be made. If the arrangement of the clauses is taken into consideration, it can only imply that even if a person has technically qualified, still he can be disqualified on the basis of the site visit report. If the person fails in the technical qualification, the report of the site visit becomes immaterial. Therefore, the contention so raised is rejected. Similarly, the objection regarding the quantity is also rejected, as the quantity is only approximate as per clause 4.5 of the tender conditions, which reads as follows:

"4.5 Change of *quantity*:

Quantity given in the Notice Inviting Tender is approximate and it is likely to vary. The Corporation,

if necessary, shall either reduce or increase the quantity mentioned in the tender to an extent of 25% of the tendered quantity."

30. Another contention put forth by the petitioner was that the rejection of the sample was not intimated to them and therefore, they could not prefer an appeal under Section 11 of the Act, which, for better clarification, is extracted as under:

"11. (1) Any Tenderer aggrieved by the order passed by the Tender Accepting Authority under section 10 may appeal to the Government within ten days from the date of receipt of order and the Government shall dispose the appeal within fifteen days from the date of receipt.

(2) In disposing of an appeal under sub-section (1), the Government may, after giving the party an opportunity of making his representations, pass such order thereon as they may deem fit.

(3) The order of the Government on such appeal shall be final.

(4) The Government may, pending the exercise of their powers under this section pass such interlocutory orders as they may deem fit."

31. In this regard, it is worth pointing out that the affidavit filed by the petitioner and the copies of the documents enclosed in the typed set, more particularly, letter dated 06.07.2018, the contents of which are reproduced below, would reveal that the petitioner had the knowledge about the rejection of his technical bid:

"Sub: Massive bungling enabling cartel permission to create a direct loss of more than Rs.26.00 Crores appx. to the Government exchequer in the matter of purchase of 58.09 lacs pairs of Footwear (Velcro Sandal for Boys & Girls) for school children in Tamil Nadu RC No.1119/C1/2018 Advertised on dated 06/04/2018 by Tamil Nadu Textbook & Educational Services Corporation, Chennai-600 006.

Respected Sir/s,

1. The above Corporation notified NIT on 06.04.2018 for purchase of 58.09 Lacs pairs of Footwear (Velcro Sandal for Boys & Girls) for School Children in Tamilnadu as per the specifications given as a part of the terms of the tender.

2. The samples of all the bidders was sent for evaluation to CLRI, Chennai which is incidentally not NABL accredited.

3. The Technical Bid is scheduled to open of only Five Bidders and the names are as under:-

No.	Name of Bidder	Average Price per pair (Appx.)
1.	Manjit Plastics	Basic Rs.180.00 +
2.	Charanpaduka Industries Pvt.Ltd	
3.	M.B.Rubber Pvt. Ltd	
4.	H.B.Rubber Pvt. Ltd	
5.	Today Footwear	

Our price will have a MINIMUM difference viz-a-viz above price of Rs.45.00 per pair which is a clear indication & confirmation of cartel formation and by rejecting the undersigned bid a whooping difference of Rs.26.14 crores is the DIRECT LOSS TO THE GOVERNMENT EXCHEQUER.

Under the above circumstances, it is clear that cartel was permitted to be formed by the connivance of the system. Hence, we request for personal intervention which is required to be scrutinized and will expose the manner in which this loss of approximately Rs.30.00 crores appx. to the exchequer is being benefited by who all.

I request your goodself for immediate intervention in the matter.

Yours faithfully,"

32. Be it noted that in para 57 of the Judgment in **Chennai Metropolitan Water Supply and Sewerage Board, Chennai v. M/s.Khrunichev State Research and Production Space Centre, Chennai, [2004 SCC OnLine Mad 691]** (supra), the Division Bench of this Court has held as follows:

"57. That was a letter written by the concern called First Planet Engineering, and the signatory to the letter is none other than the deponent to the Writ Affidavit. Therefore, it is clear that the rejection of the petitioner's tender was duly communicated to the petitioner that though not in the form of a written order. It is not the case of the petitioner such failure on the part of the second respondent in not communicating the rejection in the written form caused any prejudice to the petitioner either for filing an appeal or for any other reason. In fact, the petitioner is stated to have again submitted its Tender for the Re-bid It is true that the Rules and Regulations prescribed in the matter of conduct of any bid should be scrupulously followed as directed by the Hon'ble Supreme Court. Viewed in that respect, the non communication of the rejection by a specific written order can be construed as a violation

of the provisions of the Tamil Nadu Transparency in Tenders Act 1998, but the question is whether on that score, there would be any scope for this Court to interfere with the admitted rejection of the petitioner's bid on a valid ground, viz., for non-submission of EMD. In our considered view, the firm answer should be 'no'. If the petitioner has got any other relief to be claimed on that score, if so available, it is for the petitioner to work out the same. Certainly on that score, there is no scope for interfering with the said rejection of the petitioner's bid by the second respondent as made by it on 27-8-2003. In other words, the rejection of the petitioner's bid for violation of the stipulations contained in the 'RFP' as well as that of Rule 14 of the Tamil Nadu Transparency in Tenders Rules 2000 is final and conclusive and the same cannot be interfered with."

33. Thus, the petitioner is aware of the fact that his technical bid is rejected. The petitioner is also aware of Clause 4.23.2 of the tender conditions, which states that only the bidders whose technical bid qualify for finance bid, which is evident from para 24 of their affidavit. If the petitioner was aggrieved by the clauses in the tender, they ought to have challenged the same at the appropriate stage and not after accepting and participating in the tender. In the affidavit filed by the petitioner, in paras 21 and 24, the petitioner has stated that only on 11.07.2018, the knowledge about rejection of their technical bid came to them. In the last few lines of para 24, the petitioner claims to have written a letter dated 10.07.2018 seeking

confirmation of opening of commercial bid. Further, the email of the 3rd respondent dated 24.07.2018 wherein the petitioner was intimated the reasons for rejection, was also filed by the petitioner in their typed set and stated about the same in para 25 of their affidavit. The writ petition was sworn on 27.07.2018. The affidavit has been attested on 02.08.2018 and the writ petition has been represented on 03.08.2018. Such being the case, the contention so raised by the petitioner, in the opinion of this Court, amounts to misrepresentation as contrary to their very own letters and the contrary contents of the affidavit would reflect that they had knowledge about the rejection of their technical bid. Therefore, the conduct of the petitioner is reprehensible. Further, there is nothing preventing the petitioner from preferring an appeal under Section 11. Thus, the contention of the petitioner regarding violations of the principles of natural justice and the denial of opportunity to prefer an appeal is rejected.

34. In the present case, the technical bid of the petitioner has been rejected, as it has not satisfied the parameters or the specifications and hence, the price bid of the petitioner has not been rightly considered. A contention similar to that of the petitioner that even if the technical bid is rejected, the price bid can be opened in

public interest, was negated by the Division Bench of this Court in W.A.No.132 of 2016 (Supra). Once the qualifications are prescribed, the same have to be meticulously followed. An unqualified person is not entitled to any indulgence and has no locus to challenge the selection. Therefore, the question of public interest would not arise in this case. The judgment of the Chhattisgarh High Court relied upon by the petitioner is on a different footing and has no application to the facts of the present case. This Court has in fact condemned the baseless allegations against an expert body.

35. It is noteworthy to mention here that the prices have been fixed only after negotiations. Just because the petitioner has quoted a lesser price, it cannot be taken as the market value. Such question would arise only if the appropriate authority is not satisfied with the negotiations. This Court has already discussed about the back hand tactics of the petitioner. Hence, this contention of the petitioner is also rejected.

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36. For all the afore stated reasons, this Court is of the view that the petitioner has not made out a case for judicial review in award of contracts under Article 226 of the Constitution of India as the

actions of the first to fifth respondents are not arbitrary, perverse, *mala fide* or reflecting favoritism, rather the procedure under the terms and conditions of the tender and the provisions of the Tamil Nadu Transparency in Tenders Act and Rules have been followed.

37. In the upshot, this writ petition fails and is accordingly dismissed. The respondents 1 and 2 are directed to proceed and complete the tender processes and ensure supply of best quality of shoes to the children. No costs. Consequently, the connected miscellaneous petitions are also dismissed.

22.11.2018

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Index: Yes/ No

To

1. Tamil Nadu Textbook and Educational Services Corp.
rep. by its Managing Director,
No.68, EVK Sampath Maaligai,
DPI Campus, College Road,
Chennai, Tamil nadu -600 006.

2. The Managing Director,
Tamil Nadu Textbook and Educational Services Corp.
No.68, EVK Sampath Maaligai,
DPI Campus, College Road,
Chennai, Tamil Nadu -600 006.

R.MAHADEVAN, J.

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WP.No.20406 of 2018

22.11.2018

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