

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

WRIT APPEAL No.409 of 2018

Between:

B. Sailesh Saxena.

.... Appellant

and

The Union of India and others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 04.06.2018.

SUBMITTED FOR APPROVAL:

HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?
2. Whether the copies of judgment may be marked to Law Reports/Journals
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

RAMESH RANGANATHAN, ACJ

*** HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN**
AND
*** THE HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI**
+ WRIT APPEAL No.409 of 2018

% Dated:04.06.2018

Between:

B. Sailesh Saxena.

.... Petitioner

and

\$ The Union of India and others.

..... Respondents

! Counsel for Appellant: Sri S. Niranjan Reddy, Learned Senior Counsel; Sri Avinash Desai, Learned Counsel for the appellant.

^ Counsel for respondents: Sri S. Ravi, Learned Senior Counsel; Learned Advocate-General; Sri N. Siva Reddy, Learned Standing Counsel; Sri Ch.Pushyam Kiran, Learned Counsel for respondents

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? Citations:

- 1) 2003 (1) ALD 463 (AP)
- 2) AIR 2005 Delhi 247
- 3) 2005 (1) CTLJ 353 (Delhi)
- 4) AIR 2012 SC 2915
- 5) (2007) 4 SCC 517
- 6) AIR 2005 SC 469
- 7) (2009) 6 SCC 171
- 8) (1997) 9 SCC 495
- 9) (1975) 1 SCC 70
- 10) AIR 1981 SC 873
- 11) AIR 1968 SC 1323
- 12) AIR 1970 SC 1453
- 13) 2008 (4) Mh.L.J. 404
- 14) (2007) 8 SCC 1
- 15) (2003) 5 SCC 437
- 16) (2007) 8 SCC 418
- 17) (2014) 3 SCC 760 = AIR 2014 SC 390
- 18) AIR 1996 SC 11
- 19) AIR 1999 SC 393
- 20) (2000) 2 SCC 617 : (2000) 1 SCR 505
- 21) AIR 1996 SC 51
- 22) AIR 2007 SC 437

- 23) (2008) 16 SCC 215
- 24) (2006) 10 SCC 236
- 25) 1990 4 JT 601
- 26) 1985 8 SCR 909
- 27) 2005 7 JT 214
- 28) 1991 1 JT 605
- 29) (2012) 6 SCC 464
- 30) 2004 Suppl 1 JT 502
- 31) (2003) 4 SCC 579
- 32) (1988) 1 AC 858 = (1988) 2 WLR 654 (HL)
- 33) (2000) 5 SCC 287
- 34) (1997) 7 SCC 592
- 35) (2001) 8 SCC 491
- 36) (2005) 6 SCC 138
- 37) (2010) 14 SCC 253
- 38) (1990) 3 SCC 280
- 39) [1981] 1 SCC 568
- 40) [1997] 1 SCC 738
- 41) (2014) 4 ALD 652
- 42) [1996] 2 SCC 405
- 43) [1995] 1 SCC 478
- 44) (2006) 10 SCC 1
- 45) 2004) 4 SCC 714
- 46) LAWS -TLMAD 2003-0-582: MANU/TN/0192/2003
- 47) AIR 1974 SC 1631
- 48) AIR 1967 SC 1305
- 49) (1955) 1 SCR 1045
- 50) (1959) SCR 279
- 51) (2013) 8 SCC 519
- 52) (1974) 1 SCC 19
- 53) (2013) 5 SCC 427
- 54) (2011) 7 SCC 639
- 55) (1996) 5 SCC 125
- 56) (2013) 2 SCC 772
- 57) (2002) 3 SCC 302
- 58) (2003) 9 SCC 358
- 59) (1990) 4 SCC 366
- 60) (2002) 4 SCC 539
- 61) (2014) 8 SCC 390
- 62) (1974) 4 SCC 428
- 63) 1989 Suppl. (1) SCC 116
- 64) (1994) 3 SCC 569
- 65) (2004) 3 SCC 609
- 66) (2003) 7 SCC 83
- 67) (2010) 3 SCC 314
- 68) (2011) 2 SCC 575
- 69) (2013) 8 SCC 154
- 70) AIR 1967 SC 839
- 71) (1990) 3 SCC 223
- 72) 320 US 591, 602 (1944)
- 73) (1994) 6 SCC 349
- 74) (2009) 7 SCC 561
- 75) AIR 1965 SC 1578
- 76) 2002 (5) ALD 510
- 77) 2003 (1) ALD 64
- 78) (1988) 4 SCC 534
- 79) 1962 Supp (2) SCR 380 : AIR 1962 SC 945
- 80) (1964) 1 SCR 561 : AIR 1963 SC 1638
- 81) (1963) 2 SCR 353 : AIR 1963 SC 222
- 82) AIR 1951 SCD 41 = 1950 SCR 869
- 83) (1983) 1 SCC 51
- 84) (2004) 1 SCC 712
- 85) (1964) 7 SCR 32 : AIR 1964 SC 1501
- 86) (1997) 3 SCC 410
- 87) 1966 Supp SCR 401 : AIR 1967 SC 122
- 88) (2001) 1 SCC 353 : 2001 SCC (L&S) 1000
- 89) (1973) 2 SCC 836
- 90) (1993) 2 SCC 279
- 91) (1995) 5 SCC 482



**HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI**

WRIT APPEAL No.409 of 2018

JUDGMENT: (per the Hon'ble The Acting Chief Justice Ramesh Ranganathan)

The appellants herein are petitioners 1 and 2 in W.P. No.33695 of 2017. They, along with respondent Nos.6 and 7 herein, invoked the jurisdiction of this Court seeking a writ of mandamus to declare the action of the 2nd respondent-Transmission Corporation of Andhra Pradesh (hereinafter called "A.P. Transco") in issuing the EPC Works Tender bearing ID No.119074 announced vide IFB/Tender Notice No.APT-e-05/2017, including conditions tailor-made to qualify only the fourth respondent-LS Cable India Pvt. Ltd, as illegal, arbitrary and unconstitutional; to set aside the said EPC work tender; to restrain the respondents from procuring the EPC work through the subject Tender; direct the respondents not to give effect to, or take further steps pursuant to, the said Tender; to direct the respondents to place on record the official records pertaining to the subject tender; and consequently, after retrieving the said records, to set aside/quash the decision of the respondents in setting out the qualification requirement as mentioned in the subject tender; and to direct the respondents to cancel the bids received pursuant to the subject tender. The parties to this appeal shall, hereinafter, be referred to as they are arrayed in the Writ Petition.

The petitioners claim to be dominant market players engaged in the manufacture, supply and laying of power cables in the power transmission and distribution industry, and to have been manufacturing and supplying extra high voltage cables of upto 220

KV for the last seven years, including underground cable systems on turnkey basis. They invoked the jurisdiction of this Court contending that the qualification requirements (for short the “QRs”) set out in the tender notification are wholly arbitrary, irrational, more stringent than the actual requirement for execution of the tender, and tailor made to suit only the bid of the 4th respondent.

The 2nd Respondent invited tenders, on its *e-procurement platform*, for supply, laying, testing and commissioning of 220 KV 1000 sq.mm XLPE underground (U/G) copper cable, with associated accessories including services, for jointing, terminations, site testing and commissioning the complete cable system for diversion of 220 KV lines, which were passing across the Seed Capital Region (at Amaravathi in Guntur District) on a turnkey basis. Originally, the work notified, under the above said Tender Notice, was for 220 KV and 132 KV EHT lines diversion. However by way of a corrigendum, issued to the above mentioned Tender Notice on 19.09.2017, the work relating to laying of 132 KV EHT lines was deleted, and the Estimated Contract Value (ECV) was reduced from Rs.670.74 Crores to Rs.544.24 Crores.

Tenders were invited on the e-procurement platform, and the notification inviting tenders was published in the newspapers on 29.04.2017. The bid documents were allowed to be downloaded from the e-procurement platform on 04.05.2017, and the last date for submission of bids was originally stipulated as 02.06.2017. At the request of the bidders, from time to time, the last date for submission of bids was extended till 30.10.2017. A pre-bid meeting was held on 18.05.2017 wherein several bidders raised queries regarding various technical aspects, and on the

qualification requirements. The 2nd respondent furnished its reply to all these queries by 20.09.2017. Even before the extended last date for submission of bids expired on 30.10.2017, the appellants herein, along with respondents 6 and 7, filed W.P.No.33695 of 2017 before this Court on 09.10.2017. While the 2nd respondent filed its counter-affidavit on 24.10.2017, an interim order was passed on the same day recording the agreement of both Counsel that the tender process may go on, but the price bids shall not be opened after scrutinizing the technical bids, and shall be submitted to the Court for verifying the allegations. Thereafter, the pre-qualification bids (technical bids) were opened on 31.10.2017. The pre-qualification bid analysis (technical bids evaluation) statement was prepared and submitted to the Learned Single Judge on 15.11.2017 and, thereafter, the Writ Petition came to be dismissed by order dated 25.01.2018.

In the order under appeal, the Learned Single Judge noted the submissions urged on behalf of the petitioners by Sri S. Niranjan Reddy, Learned Senior Counsel, that the qualification requirement of a bidding manufacturer, having the execution capability of 245 Kms of 220 KV, and a copper conductor cable of 1000 Sq.mm, in one continuous period of 12 months in the last seven years was a far higher requirement than that required for execution of the tender work; prescribing such a far higher standard, than the performance required under the Contract, was wholly irrational and unjustified; clubbing of all the four routes into one single tender was a major departure from the normal procedure; the qualification requirements were tailor made to ensure that no Indian manufacturer, on its own credentials, would

be in a position to qualify; the qualification requirements were restrictive, unrealistic and discouraged fair competition; a subsidiary of an overseas company was allowed to participate in the tender with a meagre 2 kms length of 220 KV cable experience; the subsidiary was allowed to rely on the experience of the overseas manufacturer to satisfy the qualification requirements; as the qualification requirement was tailor made to eliminate other competitors, and facilitate award of the tender in favour of the 3rd respondent, the tender qualification requirements violated the fundamental rights of the petitioners guaranteed under Articles 14, 19(1)(g) and 301 of the Constitution of India, besides being contrary to the principles of fair play and justice; and these qualification requirements were, therefore, liable to be struck down. Reliance was placed on behalf of the petitioners on **Bharat Biotech International Limited v. Health and Medical Housing and Infrastructure Development Corporation**¹; **Dhingra Construction Company v. Municipal Corporation of Delhi**² and **Gharda Chemicals Limited v. Central Warehousing Corporation**³.

The Learned Single Judge, thereafter, noted the submission of the Learned Advocate General, appearing on behalf of A.P. Transco, that the laying of 220 KV underground cable lines, which passed through the seed capital region, was correlated to the execution of the construction of the capital complex of the State of Andhra Pradesh; all the four route works were made into one lot for better space management, and to attend to complaints in case

¹ 2003 (1) ALD 463 (AP)

² AIR 2005 Delhi 247

³ 2005 (1) CTLJ 353 (Delhi)

of failure of any of the four lines by a single manufacturer; if four different routes were awarded to four different bidders, blending of cable accessories would not be technically feasible; all reasonable precautions were taken while formulating the tender qualification requirements, including the factor of time constraint, for effective and early completion of the work; 18 prospective bidders, including representatives of the 1st and 3rd petitioners, had participated in the pre-bid meeting held on 18.05.2017; the prospective bidders had sought clarifications; the clarifications furnished by the 2nd respondent were placed in their e-platform; in matters of tenders and award of contract, the scope of judicial review was limited; and such a power of judicial review could not be invoked to protect private interest at the cost of public interest. Reliance was placed by the Learned Advocate General on **Michigan Rubber (India) Limited v. The State of Karnataka**⁴.

The Learned Single Judge also noted the submission of Sri S. Ravi, Learned Senior Counsel appearing on behalf of respondents 3 to 5, that A.P. Transco had been awarding similar nature of works as a single lot; one such work was of 182 kms of 220 KV lines; in the instant case the object sought to be achieved, in imposing such a qualification requirement, was to ensure early completion of the tender work so as to co-relate it with the construction work of the Capital Complex of the State of Andhra Pradesh; no motives or allegations of discrimination could be made against A.P. Transco prescribing such qualification requirements; even without participating in the bid, the petitioners could not interdict the process which was time bound; as they had not

⁴ AIR 2012 SC 2915

participated in the tender process, the petitioners could not espouse the cause of public interest in this Writ Petition; and their non-participation did not render the tender non-competitive, as there were three bidders in the fray as joint venture partners. Reliance was placed by the Learned Senior Counsel on **Jagdish Mandal v. State of Orissa**⁵ and **Association of Registration of Plates v. Union of India**⁶.

The Learned Single Judge, thereafter, observed that the tender floated by A.P. Transco was a global tender; the nature of work involved sophisticated methods with technical know-how and speedy execution of work; the question which necessitated consideration was whether the tender qualification requirements, as formulated, was tailor made to choose a particular bidder of the choice of A.P. Transco; the basis for such an allegation made by the petitioners was two fold, firstly that four separate works had been clubbed together to create a single large tender without any reason or justification; secondly that the bidder must have past experience of manufacture and supply of 220 KV cable of 245 kms length in 12 months, when the tender itself was for supply of 245 km length 220 KV cables in 24 months; the qualification requirement of the subsidiary of the overseas manufacturer having experience of only 2 km length of 220 KV cable was extremely low; and the low limit was fixed, as the Indian subsidiary of LS Cables i.e., the 3rd respondent had experience of only 2 kms.

The Learned Single Judge held that this Court would not probe into the issue whether clubbing of four separate works together to create a single large lot was technically correct or not;

⁵ (2007) 4 SCC 517

⁶ AIR 2005 SC 469

the reasons given by A.P. Transco, in consolidating all the four routes as one lot, was that laying of 220 KV underground cable lines, passing through the Seed Capital Area, was correlated to the execution of the construction work of the capital complex of the Sunrise State of Andhra Pradesh, and choosing a single joint venture of companies was aimed at better management of space, time, blending of cable accessories, rectification of complaints in case of failure of any of the four lines; from the technical point of view, if the four routes were awarded to four different bidders, blending of cable accessories would not be technically feasible; the decision to club all the four routes, each containing several number of phase lines, into a single lot was taken for effective execution of the work, so as to have an option to divert the cable from one lot to the other for timely completion of the work; as underground cabling is susceptible to failure, if the work was awarded to more than one bidder, the respondents would have to depend upon several agencies for timely rectification of such failures; and hence such consolidation of the four routes into one lot, for effective execution of the works and to reach timely targets, could not be faulted as no arbitrariness or motive was either visible or latently or patently discernable. After referring to the judgment of the Supreme Court, in **Jagdish Mandal**⁵ and **Meeerut Development Authority v. Association of Management Studies**⁷, the Learned Single Judge held that, in matters of tender and award of contract, if a decision, relating to the award of contract, was bonafide and in public interest, Courts would not, in the exercise of their power of judicial review, interfere even if a

⁷ (2009) 6 SCC 171

procedural aberration or error in assessment or prejudice to a tenderer was made out.

On the question whether the project requirement, which was only for supply and laying of 245 kms cables in 24 months, justified the prescription of the qualification requirement of past experience of atleast 245 kms, with a copper conductor cable of 1000 Sq.mm, in one continuous period of 12 months; and whether such eligibility criteria was arbitrary and in violation of Articles 14 and 19(1)(g) of the Constitution of India, the Learned Single Judge noted the contention urged on behalf of the petitioners that, with this prescribed qualification requirement, no Indian manufacturer, on its own credentials, would be in a position to qualify; and in the last seven years there was no tender for supply of 245 kms of power transmission cables in a period of 12 continuous months.

The Learned Single Judge observed that the project was a large and key project in the power sector; the 2nd respondent could choose the best market players to get its work done; as it was a global invitation, overseas cable manufacturing industries had also participated in the tender process; it would be better served, if the participating cable manufacturing market players were also large and reputed in the industry commensurate with the nature and quantum of work notified in the tender; as selection of the contractor was made through a process of open competition, inviting global tenders, there could be little scope for favouritism; in its counter-affidavit, A.P. Transco had stated that there were more than four manufacturers who had the required experience to meet the eligibility criteria specified in the qualification requirement i.e., (i) M/s. Ljin Cables Limited, South Korea, (ii)

M/s. Taihan Cables Limited, South Korea, (iii) M/s. Shenyong Furukawa Cables Limited, China and (iv) M/s. J. Power, Japan; the companies at (ii) and (iii) had earlier entered into joint venture agreements with Indian companies, and had executed approximately similar nature and quantum of work of A.P. Transco; during the year 2010, A.P. Transco had awarded a similar nature of work involving 182 kms of 220 KV lines, in addition to supply of 72.5 kms of 132 KV lines, as a single lot to M/s. Indu Projects Limited, Hyderabad, with its joint venture partner M/s. LS Cable & Systems Limited, South Korea (4th respondent); though Indian manufacturers were well experienced, and individually had the manufacturing capacity with contemporary technology, that itself did not create a claim that the qualification requirements should match their manufacturing and execution capabilities; three bids were received including the 4th and 5th respondents combined joint venture; out of the three bids, two bidders fulfilled the qualification requirements and specifications of the tender; and the contention that no Indian company could fulfill the qualification requirements, set out in the tender, was without any substance.

The Learned Single Judge relied on **Michigan Rubber (India) Limited**⁴ to hold that it is only if the process of decision making was malafide, or arbitrary and irrational, could Courts interfere. The Learned Single Judge further held that the judgment, in **Bharat Biotech International Limited**¹, was not applicable to the facts of the present case; in **Bharat Biotech International Limited**¹, this Court had found that there was only one manufacturer, with WHO pre-qualification, who could supply the

vaccine; the State had definite information that only one such manufacturer existed; yet, for mysterious reasons, the State chose to call for tenders, which was held to be tailor made to suit only one person; the judgment of the Delhi High Court was also inapplicable; though the petitioners had participated in the pre-bid meeting held on 18.05.2017, they neither participated in the tender process nor did they submit their bid; and merely because the petitioners did not qualify to submit the tender, and did not fulfill the qualification requirements laid down therein, it was not open to them to contend that the qualification requirements was tailor made, discriminatory and arbitrary, and they were prescribed to promote parties with overseas collaborations and exclude Indian manufacturers. The challenge to the qualification requirements, in the tender notification, was rejected and the Writ Petition was dismissed. Aggrieved thereby the present Appeal was filed by petitioners 1 and 2 in W.P.No.33695 of 2017.

Elaborate oral submissions were made by Sri S.Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, the Learned Advocate-General appearing on behalf of the 2nd respondent, and Sri S. Ravi, Learned Senior Counsel appearing on behalf of respondents 3 to 5. Written submissions were also filed by Sri Avinash Desai, Learned Counsel for the appellants, Sri N. Siva Reddy, Learned Standing Counsel for the 2nd respondent, and Sri Ch.Pushyam Kiran, Learned Counsel for respondents 3 to 5. It is convenient to examine the rival submissions put forth on behalf of the appellants, the 2nd respondent and respondents 3 to 5, under different heads.

I. SCOPE OF JUDICIAL REVIEW OF THE QUALIFICATION REQUIREMENTS IN THE TENDER NOTIFICATION:

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, would submit that the Qualification Requirements, as stipulated in the tender notification, violate the doctrine of a level playing field enshrined in Article 19(1)(g) and Article 14 of the Constitution of India; this doctrine requires competitors to be allowed to participate in the tender so as to subserve larger public interest; in the present case, the 2nd respondent, by providing exaggerated QRs in excess of the tendered work, over specification with regard to the size and nature of the material for the cable, and clubbing four independent packages into one, have intentionally reduced competition for the tendered work in violation of the doctrine of a level playing field; and the intention to restrict competition is further evident from the fact that respondent No. 2, even prior to the submission of the bids, was aware that only four manufacturers in the world would qualify as per the QRs.

It is contended on behalf of the respondents that, ordinarily, this Court would not scrutinize the rationale behind the project; the Project Implementing Authority is the best judge to decide technical aspects; and this Court neither has the expertise, nor would it substitute its wisdom for that of the Project Implementing Authority. Reliance is placed, on behalf of the respondents, on **Jagdish Mandal**⁵ in this regard.

Although a citizen has a fundamental right, under Article 19(1)(g), to carry on a trade or business, he does not have the fundamental right to insist that the Government, or any other individual, should carry on business with him. The government, or

the individual concerned, has the right to enter into a contract with a particular person or to determine person or persons with whom he or it will deal. (**Krishnan Kakkanth v. Govt. of Kerala**⁸). If the State, or its instrumentalities, act reasonably, fairly and in public interest, interference by Courts is restricted, since no person can claim a fundamental right to carry on business with the Government. (**Michigan Rubber (India) Ltd**⁴). All that such a person can claim is that, in competing for the contract, he should not be unfairly treated and discriminated to the detriment of public interest. (**Association of Registration Plates**⁶; **Erusian Equipment & Chemicals Ltd. v. State of W.B**⁹). In determining the infringement of the right, guaranteed under Article 19(1) of the Constitution of India, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into the judicial verdict. (**Laxmi Khandsari v. State of U.P**¹⁰; **Treveli v. State of Gujarat**¹¹; **Herekchand Ratanchand Banthia v. Union of India**¹²; **Krishnan Kakkanth**⁸).

A “level playing field” is a situation in which every one has a fair and equal chance of succeeding. This, in commercial parlance, is a concept of fairness and requires all eligible players to be permitted to play by the same set of rules. A playing field is at a level if no external interference affects the ability of players to compete fairly. In the matter of awarding Government contracts, the doctrine of ‘level playing field’ plays an important role. (**Shree**

⁸ (1997) 9 SCC 495

⁹ (1975) 1 SCC 70

¹⁰ AIR 1981 SC 873

¹¹ AIR 1968 SC 1323

¹² AIR 1970 SC 1453

Ostwal Builders v. State of Maharashtra¹³). This doctrine, embodied in Article 19(1) (g) of the Constitution, provides space within which equally-placed competitors are allowed to bid so as to subserve larger public interest. The terms and conditions, of the invitation to tender, must indicate, with legal certainty, norms and benchmarks. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment, and may violate the doctrine of "level playing field". (**Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd**¹⁴). In the matter of inviting tenders, and in awarding Government contracts, public interest is the paramount consideration. (**Shree Ostwal Builders**¹³). It is not even the appellants case that the qualification requirements are either vague or uncertain. All those who fulfilled the qualification requirements were entitled to submit their bid. As shall be elaborated later in this order, the stipulated qualification requirements have a rational relation to the work sought to be executed, and the 2nd respondent cannot, therefore, be said to have violated the doctrine of a level playing field.

Standards applied by Courts, in judicial review, must be justified by constitutional principles which govern the proper exercise of public power. Article 14 of the Constitution embodies the principle of "non-discrimination". (**Reliance Energy Ltd**¹⁴). The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heart beat of fair play. The State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized

¹³ 2008 (4) Mh.L.J. 404

¹⁴ (2007) 8 SCC 1

than precisely defined. The question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and, if so, does it really satisfy the test of reasonableness." (**Union of India v. International Trading Co**¹⁵; **Reliance Energy Ltd**¹⁴).

In examining the contention, urged on behalf of the appellants, regarding the validity of the qualification requirements stipulated in the tender notification, Courts must remain conscious that the scope of judicial review in such matters is extremely limited. In economic and commercial matters, decisions are taken by the government or its instrumentalities keeping in view several factors, and it is not possible for the Courts to consider competing claims and conflicting interests, and conclude which way the balance tilts. There are no objective, justiciable or manageable standards to judge these issues nor can such questions be decided on *a priori* considerations. (**Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal**¹⁶). All that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment. (**Maa Binda Express Carrier v. North-East Frontier Railway**¹⁷; **Tata Cellular v. Union of India**¹⁸; **Raunaq International Ltd. v. I.V.R. Construction Ltd.**¹⁹; and **Jagdish Mandal**⁵).

Commercial transactions, of a complex nature, involve balancing and weighing all relevant factors, and a final decision is

¹⁵ (2003) 5 SCC 437

¹⁶ (2007) 8 SCC 418

¹⁷ (2014) 3 SCC 760 = AIR 2014 SC 390

¹⁸ AIR 1996 SC 11

¹⁹ AIR 1999 SC 393

taken on an overall view of the transaction. (**Air India Ltd V. Cochin International Airport Ltd**²⁰). When the power of judicial review is invoked, in matters relating to inviting tenders or award of contracts, certain special features should be borne in mind. Inviting tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. The limited scope of judicial review by the High Court envisages examination of the question whether there is any material irregularity in the decision making process. If the decision, relating to the award of contract, is bonafide and in public interest, Courts will not interfere even if a procedural aberration or prejudice to a tenderer is made out. The power of judicial review will not be invoked to protect private interest at the cost of public interest. (**Jagdish Mandal**⁵; **Sterling Computers Ltd v. M & N Publications Ltd**²¹; **Tata Cellular**¹⁸; **Raunaq International Ltd.**¹⁹; **Air India Ltd.**²⁰; **Association of Registration Plates**⁶; **B.S.N. Joshi v. Nair Coal Services Ltd.**²²; **Siemens Public Communication Networks (P) Ltd. v. Union of India**²³).

The High Court should, normally, exercise judicial restraint unless illegality or arbitrariness, on the part of the employer, is apparent on the face of the record. (**B.S.N. Joshi**²²; **Jagdish Mandal**⁵). The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are paramount are commercial considerations. (**Air India**

²⁰ (2000) 2 SCC 617 : (2000) 1 SCR 505

²¹ AIR 1996 SC 51

²² AIR 2007 SC 437

²³ (2008) 16 SCC 215

Ltd²⁰). But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down, and cannot depart from them arbitrarily. The Court can examine the decision making process, and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. (**Air India Ltd**²⁰). While contractual matters are not beyond the realm of judicial review, its application is limited (**Noble Resources Ltd. v. State of Orissa**²⁴; **Indian Oil Corpn. Ltd. v. Amritsar Gas Service**²⁵; and **LIC of India v. Escorts Ltd.**²⁶) primarily to the infirmity in the decision making process, and whether it is reasonable and rational or arbitrary and in violation of Article 14 of the Constitution of India. (**Sterling Computers Ltd**²¹).

The Court does not sit as a court of appeal, but merely reviews the manner in which the decision was made. Although the terms of the invitation to tender is not open to judicial scrutiny, as it is in the contractual realm, Courts examine the award of contract, by the Government or its agencies, to prevent arbitrariness or favouritism. (**Noble Resources Ltd**²⁴; **Binny Ltd. v. V. Sadasivan**²⁷; **G.B. Mahajan v. Jalgaon Municipal Council**²⁸; **Sterling Computers Ltd**²¹; **Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa**²⁹; **Directorate of Education v. Educomp Datamatics Ltd**³⁰).

²⁴ (2006) 10 SCC 236

²⁵ 1990 4 JT 601

²⁶ 1985 8 SCR 909

²⁷ 2005 7 JT 214

²⁸ 1991 1 JT 605

²⁹ (2012) 6 SCC 464

³⁰ 2004 Suppl 1 JT 502

Courts are, generally, slow to interfere in such matters, unless it is shown that the decision is tainted by lack of fairness in procedure, illegality and irrationality. Judicial review is concerned with reviewing not the merits of the decision by an executive authority, but the decision making process itself. (**Gharda Chemicals Limited**³¹; **Indian Railway Construction. Ltd. v. Ajay Kumar**³¹). The actions of the State or its instrumentalities are amenable to judicial review only to the extent that they must act validly for a discernible reason, and not whimsically for any ulterior purpose. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, interference by the Court is limited. (**M/s. Michigan Rubber (I) Ltd.**⁴).

The Government must have freedom of contract. A free play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. The decision must, however, be free of unreasonableness or arbitrariness. It must not be affected by bias or actuated by mala fides. The Court is entitled to investigate the action taken by the authority to ascertain whether or not they have taken into account matters which they ought not to have taken into account or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once this question is answered in favour of the authority, it may still be possible to say that, although the authority had confined its decision within the four corners of matters which they ought to consider, they have, nevertheless, come to a conclusion so

³¹ (2003) 4 SCC 579

unreasonable that no reasonable authority could ever have come to. In such a case also, the Court can interfere. (**Dhingra Construction Co²; Tata Cellular¹⁸; R. v. Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd³²**).

Courts can interfere when the terms of invitation to tender or the award of contract is arbitrary, discriminatory or malafide, or if it has no nexus with the object it seeks to achieve. The power of judicial review should be exercised with great care and circumspection, and not merely because it feels the measure to be incorrect. Judicial intervention would be warranted only when overwhelming public interest so requires it. (**Dhingra Construction Co.²; Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corpn³³; Educomp Datamatics Ltd.³⁰; MP Oil Extraction v. State of MP³⁴; Air India Ltd²⁰**).

Even in contractual matters, a public authority does not have unfettered discretion, and while some extra discretion is to be conceded to such authorities in contracts with a commercial element, they are nonetheless bound to follow the norms recognised by Courts, while dealing with public property, to avoid unreasonable and arbitrary decisions being taken by them. While the authority has certain elbow room in exercising its discretion in contractual matters, the discretion conferred on them must be exercised within the four corners of the law, and not violate Article 14 of the Constitution. (**Union of India v. Dinesh Engineering Corpn³⁵; Dhingra Construction Co²**).

³² (1988) 1 AC 858 = (1988) 2 WLR 654 (HL)

³³ (2000) 5 SCC 287

³⁴ (1997) 7 SCC 592

³⁵ (2001) 8 SCC 491

If the scope of review is too broad, agencies are turned into little more than a medium for transmission of cases to the Courts. That would destroy the value of the agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. 'It makes judicial review of administrative orders a hopeless formality for the litigant. It reduces the judicial process in such cases to a mere feint. (**Bernard Schwartz, in Administrative Law, 2nd Edn., p.584; Dhingra Construction Co²**).

Before interfering in tenders or contractual matters, in the exercise of its power of judicial review, the Court should pose to itself the following questions : (i) Whether the process adopted or decision made by the authority is malafide or is intended to favour someone or the process adopted or the 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 the relevant law could have reached'; and (ii) Whether public interest is affected. If the answers are in the negative, there should be no interference in proceedings under Article 226 of the Constitution of India. (**Jagdish Mandal⁵; M/s. Michigan Rubber (I) Ltd.⁴; Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.³⁶; Himachal Pradesh Housing and Urban Development Authority v. Universal Estate³⁷; and Tejas Constructions & Infrastructure (P) Ltd²⁹**). In the absence

³⁶ (2005) 6 SCC 138

³⁷ (2010) 14 SCC 253

of allegations of malafides in their conduct, the Court must proceed on the footing that the State or its instrumentalities have acted bonafide. (**Star Enterprises v. City and Industrial Development Corpn. of Maharashtra Ltd**³⁸).

The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Government has acted fairly, even if it has faltered in its wisdom, the Court cannot, as a super auditor, take them to task. The function of judicial review is limited to testing whether the action has been fair and free from the taint of unreasonableness, and has substantially complied with the norms. (**Fertiliser Corporation Kamgar Union (Regd.), Sindri v. Union of India**³⁹; **Raunaq International Ltd**¹⁹). There are inherent limitations in the exercise of the power of judicial review. The right to choose cannot be considered as an arbitrary power. Judicial quest has been to find the right balance between discretion to decide matters and the need to remedy any unfairness. (**Tata Cellular**¹⁸; **Raunaq International Ltd.**¹⁹). Judicial review of contractual transactions by Government bodies is permissible only to prevent arbitrariness, favouritism or use of power for collateral purposes. (**Asia Foundation & Construction Ltd v. Trafalgar House Construction (I) Ltd**⁴⁰). Bearing these aspects in mind, let us now examine the contentions, urged on behalf of the appellants, regarding the validity of the qualification requirements prescribed in the subject tender notification.

³⁸ (1990) 3 SCC 280

³⁹ [1981] 1 SCC 568

⁴⁰ [1997] 1 SCC 738

II. SHOULD THE 2ND RESPONDENT HAVE SPLIT THE SUBJECT WORK INTO FOUR SEPARATE WORKS?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would submit that the 2nd Respondent has clubbed four separate works/packages without any reason or justification; such clubbing of independent works/packages, without any rationality, leads to reduction in overall competition as package wise bidding is not permitted, and the length of the cable required has been increased to suit the eligibility of Respondent Nos.3 & 4; in the Order under appeal, the Learned Single Judge dismissed this contention of the appellants on the ground that this Court would not probe into the issue whether clubbing of four separate works together, to create a single lot, was technically correct or not; the Learned Single Judge accepted the contention of the 2nd Respondent that choosing a single joint-venture of companies was aimed at better management of space, time, blending of cable accessories, and rectification of complaints in the case of failure of any of the four lines; the Learned Single Judge ought to have considered that clubbing of four packages would lead to a higher risk as any performance issue, on the part of a single manufacturer, would affect completion of all four routes; and, if the tender is split into four different routes, the cable can be replaced from four different sources rather than from one source.

It is contended, on behalf of the respondents, that the appellants allegation, relating to clubbing of four packages into a single package, is incorrect; the main reason, for clubbing the four routes into one lot, is on grounds of technical feasibility as are detailed in the counter-affidavit filed on behalf of the 2nd

respondent; there is no illegality or impropriety in doing so; this claim of the appellants, that the work should be split up into four lots to suit their convenience, is an extra-ordinary demand; merely because the appellants do not possess the requisite experience, the conditions in the tender do not become irrational; and what the appellants are seeking is cutting the cloth to fit their size.

The appellants, in effect, question the validity of the action of the 2nd respondent in prescribing certain qualification requirements in the subject tender notification. In the matter of formulating conditions of a tender document, and in awarding a contract, greater latitude is required to be conceded to the State authorities. Unless the action of the tendering authority is found to be malicious, and to be a misuse of its statutory powers, tender conditions are unassailable, and interference by Courts is not warranted. (**Association of Registration Plates⁶; M/s. Michigan Rubber (I) Ltd.⁴; CSR Infratech India Pvt Ltd v. Government of A.P⁴¹**). Although the terms of the invitation to tender is not open to judicial scrutiny as it is in the contractual realm, Courts can examine the award of contract, by the Government or its agencies, to prevent arbitrariness or favouritism. (**Noble Resources Ltd.²⁴; Binny Ltd²⁷; G.B. Mahajan²⁸; Directorate of Education v. Educomp Datamatics Ltd³⁰**).

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. (**Air India Ltd²⁰**). Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malafides,

⁴¹ (2014) 4 ALD 652

unreasonableness and arbitrariness. (**Air India Ltd**²⁰). Award of a contract is, essentially, a commercial transaction which must be determined on considerations relevant to a commercial decision. This implies that the terms, subject to which tenders are invited, are not open to judicial scrutiny unless it is found to have been tailor-made to benefit a particular tenderer or class of tenderers. If a reasonable procedure has been followed, the decision should not be challenged except on the Wednesbury principle of reasonableness (**Delhi Science Forum. v. Union of India**⁴²) and, unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. (**New Horizons Ltd v. Union of India**⁴³).

The government or its agencies, while acting in the contractual field, have considerable latitude or elbow room in finalizing the "terms of engagement". However, the requirement of fairness and non-arbitrariness must be ensured. There can be no lowering or compromise with these constitutionally sanctioned standards. The fixation of an unrealistic or exaggerated threshold as the basis for estimation, or fixing eligibility criteria which has no reasonable co-relation with the requirements of the contract, adversely impacts on the need to have fair and wide participation in a public tendering process. (**Dhingra Construction Co**²).

The nature of qualification requirements to be stipulated, in the tender notification by the tendering authorities, would depend on the nature of the work to be executed and the quantity and quality of material required, and are matters for the contractee to determine. Save prescription of tender conditions for extraneous

⁴² [1996] 2 SCC 405

⁴³ [1995] 1 SCC 478

reasons, or where the stipulated qualification requirements are so arbitrary and unreasonable as to violate Article 14 of the Constitution of India, interference by this Court would not be justified. In examining the validity of the qualification requirements, prescribed in the tender notification by the contractee, this Court must remain conscious of its lack of expertise in these matters, and should, ordinarily, defer to the wisdom of experts who have designed such conditions.

In the counter-affidavit filed on behalf of the 2nd respondent, by its Chief Engineer-Construction, it is stated that, among other reasons, the reason for opting for a single manufacturer was for better management of spares needed in case of failure of other lines; if the four routes are awarded to four different bidders, blending of cable accessories is not technically feasible; the decision to club all the four routes, each containing seven numbers of phase lines, into a single lot was taken for effective execution of the work so as to have an option to divert the cable from one lot to another for timely completion of the work; otherwise, the capital construction work would be hampered if any one of the four bidders, for the four different routes, failed to supply the material as per the schedule; all reasonable care and caution had been taken, while formulating the tender conditions, duly keeping in mind, particularly, the time constraints and co-ordination with the execution of work of the Seed Capital complex buildings; the work of laying underground cables carry with its problems in maintaining the required number of spares; if the work is allotted to more than one bidder, spares of each manufacturer would be required to be maintained; underground cables are susceptible to

failures/ problems; and, if the work is awarded to more than one bidder, the 2nd respondent would have to depend upon several agencies/entities for timely rectification of such failures/problems.

Learned Advocate-General, appearing on behalf of the 2nd respondent, would submit that if the tender is called route-wise, it is technically not feasible to use the cable and joints of the other lot manufacturers in view of warranty obligations, and system maintenance conditions; further, the 2nd respondent would have to maintain 3% spares of different make cable-end joints, which is difficult as cable joints have short off-shelf life; moreover, the 2nd respondent would have to keep 3% of the cables of four different manufacturers for maintenance purposes; if there is failure of the cables or joints, the 2nd respondent would have to depend on skilled jointers of four different manufacturers; if the work is divided into four lots, it will be very difficult to mobilize jointers in a short period on failure to meet the exigencies; if it is given to one manufacturer, it would be easy to call the agency for rectification of the failure of any lot; moreover, blending of cable accessories is not technically feasible if the work is divided into four; and taking into account all these technical parameters, the tendering authority viz., the 2nd respondent-AP Transco had invited tenders clubbing all four routes into one.

These submissions urged on behalf of the 2nd respondent, found acceptance in the order under appeal wherein the Learned Single Judge observed that consolidation of four routes into one lot, for effective execution of the work and to achieve timely targets, could not be faulted as no arbitrariness or motive was either visible or latently or patently discernable.

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, would, however, contend that clubbing of four routes into one lot would lead to a higher risk, as any performance issues on the part of a single manufacture would affect completion of all the four routes, and if the tender is split into four different routes and awarded to four different bidders, the cables can be replaced from four different sources rather than from one source.

While examining the aforesaid contention, urged on behalf of the appellants, it must be borne in mind that this Court does not sit in appeal over the decision taken by the concerned authorities in prescribing qualification requirements in the tender notification. If two views are possible, and no malafides or arbitrariness is shown, there is little scope for interference with the view taken by the authorities in inviting tenders. (**Reliance Airport Developers (P) Ltd. v. Airports Authority of India**⁴⁴; **Siemens Public Communication Networks (P) Ltd**²³). As long as the view taken by the 2nd respondent, in prescribing such conditions in the tender notification, to club all four routes into one lot and to have the entire work executed through a single manufacturer, is a possible view, this Court, in the exercise of its powers of judicial review, would not interfere even if the alternative view, canvassed on behalf of the appellants, appeals more to it.

It is relevant to note that, even during the pre-bid meetings, a similar request was made by the appellants which was not accepted by the 2nd respondent. By its letter dated 25.05.2017, the appellants informed the Chief Engineer-Construction of the 2nd

⁴⁴ (2006) 10 SCC 1

respondent that clubbing of all the big five independent circuits, in one single tender, was a major departure from past precedence; the qualification requirement of the tender had become so stringent that no Indian manufacturer, on its own credentials and experience, would be in a position to qualify; the tender requirement of manufacture of 245 Kms of 220 KV copper conductor underground cables of 1000 sq. mm or above, in one continuous period of 12 months during the last seven years, could not be met even if any particular manufacturer had taken 100% of the business, emanating from all the utilities of India, combined together; the qualification requirement was restrictive, unrealistic and discouraged competition; manufacturers like the appellants, who had extensive similar experience with renowned utilities of the Country, would not qualify; it was amusing that a subsidiary of a foreign company was allowed to participate with a meager 2 KM experience whereas an Indian company should have experience of 245 KM to qualify for the above tender; the Government of India had approved a policy for providing a preference to “Make in India” in government procurement; this policy clearly required that the qualification requirement or specification must not be restrictive, and must not result in unreasonable exclusion of local manufacturers; and the appropriate method should be through the number of vulcanization lines which the particular manufacturer had, rather than the quantum of orders executed during a continuous period of 12 months, as India never had that kind of requirement in the past.

The appellants had requested the 2nd respondent to split the tender in lots for each route, and the qualification requirement to

be so stipulated that they be on a lot wise basis in the place of the sum total of quantities of all the routes. As against the prescribed qualification requirement, the appellants wanted the past experience of the manufacturer to be reduced to a completed minimum of 45 KM of 220 KV or above grade 1000 sq. mm copper EHT cables in the last seven years, which should be in successful operation for a minimum of two years.

The question whether the work of supply and laying of underground cables, of the stipulated length and the prescribed specifications, should be entrusted to a single manufacturer, or it should be divided into four lots and separate bids invited for each lot, were all matters for the 2nd respondent to decide. As long as the decision taken by the 2nd respondent is such as to satisfy the Wednesbury test of reasonableness, (i.e any sensible man would consider the decision to be reasonable), no interference is called for. It is for the contractee, which seeks to have the work executed by the best available contractor, to prescribe the tender conditions, and thereby ensure that the most suitable person is selected to execute its work. Neither can a participating tenderer nor a prospective bidder seek prescription of conditions suitable to it, nor would this Court, in the exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India, take upon itself the task of either prescribing the tender conditions or to substitute its views for that of the contractee which had stipulated such conditions in the tender notification. The decision taken to entrust the entire work to a single joint-venture, instead of dividing it into four separate lots and awarding the work to four different

bidders, is, as stated hereinabove, a decision supported by reason and cannot, therefore, be faulted.

III. IS THE QUALIFICATION REQUIREMENT, OF MANUFACTURE AND SUPPLY OF 245 KM OF 220 KV UNDERGROUND CABLES IN A PERIOD OF TWELVE MONTHS, EXCESSIVE?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, would submit that the Qualification Requirements are exaggerated as they require past experience of manufacture and supply far in excess of the actual tendered work; the requirement that a manufacturer must have designed, manufactured, tested and supplied at least 100% of the total tendered quantity (245 Km) of 220KV or higher voltage cables, indicated in the schedule, in one continuous period of twelve months during the last seven years is exaggerated and irrational as the tendered work is for supply of 245 km of 220 KV cables in a period of 24 months; respondent No.2 had placed reliance on the general terms and conditions/eligibility in the tender notice to contend that supply of cables is to be carried out within 12 months; a perusal of the general terms and conditions would make it clear that the supply of cables is to be made in 18 months (minimum of 5 km in the first six months and balance supply in 12 months); all Indian manufacturers stand, intentionally, excluded, even though they have the requisite manufacturing capacity, as there has never been a tender for the supply of 245 km cables in a period of 12 continuous months in India; respondent No.2, in its counter-affidavit, stated that works of 'similar nature' have been awarded in the past without specifying any tender which required supply of 245 km cable in a period of 12 months; the appellants have specifically denied this averment in their Rejoinder; fixation of

an unrealistic or exaggerated threshold as the eligibility criteria, which has no reasonable co-relation with the value of the contract, would adversely impact the need to have fair and wide participation in a public tender, and would be liable to be set aside as being arbitrary and unreasonable; arbitrariness is clear from the fact that, even if a manufacturer carries out the present tendered work, he would not be in a position to meet the Qualification Requirements of the same tender; while the Learned Single Judge has recorded the contention of the appellants, regarding exaggerated QRs in the order under appeal, he has failed to deal with the said contention; over specific qualification requirements have been prescribed requiring experience in manufacturing, supplying, erection, testing and commissioning works for supply of 220 KV 1000 Sq mm copper cables of 245 KM length; each utility has specific design requirements; hence, globally, the only requirement prescribed is the voltage of the cable; the specific metal and the conductor size are never part of the QRs and have been included to favour LS Cables; similar tenders issued by the Government authorities, for power transmission cables, have never prescribed such over specific qualification requirements; prescribing such over specific QRs reduces fair and wide participation in the tender; and the Learned Single Judge has failed to even consider the aforesaid contention of the appellants. Reliance is placed on the qualification requirements prescribed by Delhi Transco, Gujarat Energy Transmission Corporation Ltd, Rajasthan Raja Vidyut Prasaran Nigam Limited, and Tamil Nadu Transmission Corporation Limited.

It is submitted, on behalf of the respondents, that it is for the 2nd Respondent to arrange its affairs, and no tenderer can dictate terms as to when, how and at what stage the tender authorities should procure the equipment for fulfilling the contract; and there is nothing irrational or arbitrary in expecting a bidder to have supplied and laid cables of the requisite specifications.

While examining and scrutinising the decision-making process, the facts of a given case may be needed to be appreciated as, otherwise, the decision cannot be tested on grounds of illegality, irrationality or procedural impropriety. To the limited extent, of scrutinising the decision-making process, it is open to the Court to review the facts. (**State of U.P. v. Johri Mal**⁴⁵; **Noble Resources Ltd**²⁴).

The subject tender notification, to which the qualification requirements under challenge in these Writ proceedings form part of, related to diversion of extra-high tension overhead lines, passing across the Amaravati Capital Region in Guntur District, by laying underground cables on a turn key basis. The estimated contract value, as originally notified, was Rs.670.75 Crores. The type of work, as prescribed, was EHT sub-stations and lines. The general terms and conditions/eligibility required the first consignment of a minimum of 5 km 220 KV 1000 sq mm copper underground cables to be supplied within six months from the date of approval of the GTP, cable section/joints/terminations drawings/ giving drum schedule for the total route whichever was later; the entire supply was required to be completed within 12

⁴⁵ 2004) 4 SCC 714

months thereafter, at the monthly equated quantity of 220 KV cables, and the joints/terminations and other accessories including co-axial and single core cables. Laying, jointing, testing and commissioning was to be completed in 15 months after issuing the manufacturing clearance. The total completion period, including testing, commissioning, was stipulated as 24 months for all lines. Testing, commissioning of individual cable routes were required to be completed independently as per the manufacturing clearance (drum schedule issued).

The stipulated qualification requirements were that the bidder/JV collectively must have the following qualifications i.e the manufacturer must have designed, manufactured, tested and supplied atleast 100% of the total tendered quantity (245 KM) of 220 KV or higher voltage underground cables, indicated in the schedule, in one continuous period of 12 months during the last 7 years which should be in successful operation for a minimum of two years; (2) the number of partners in the joint venture shall be restricted to two parties only; and (3) the bidder/JV was required to submit copies of the relevant work orders, along with handing over and taking over certificates or client certified of completion certificates, in proof of successful execution of the works substantially from any State Power utility/Central Power Utility.

The qualifications, stipulated for the manufacturer of Extra High Tension cables, were that they should have experience in having designed, manufactured, tested, supplied at least 100% of the total tendered quantity (except spares) (copper conductor cable of offered conductor size or higher size) (ie 245 KM) of 200 KV or higher voltage cable indicated in the “schedule of requirement” in

one continuous period of 12 months during the last seven years; and at least 50% of total tendered quantity (except spares) (copper conductor cable of offered conductor size or higher size) of 220 KV or higher voltage cable, indicated in the “Scheduled of Requirements” against this specification, should be in successful operation at least for more than two years as on the date of opening of the bid.

In the counter-affidavit, filed on behalf of the 2nd respondent, the Chief Engineer-Construction has stated that as per the practice in vogue in AP Transco, for the work relating to manufacture, supply, erection, testing or commissioning of cables, the completion period is determined depending upon the volume of the work; as far as manufacture and supply of material is concerned, prescription of a 12 month period has been the practice without any deviation; in the case on hand, the total completion period, taking into consideration the volume of the work, was fixed as 24 months; however, in so far as the manufacture and supply of material is concerned, since it would commence only after six months of the awarding of the work, and further time is required for laying, jointing, testing and commissioning of the cable lines, the time limit was fixed as 12 months; and therefore, considering all the said components of the work, the experience of 12 month period was specified for manufacture and supply as the qualification requirement; and there was no other consideration in fixing the period of 12 months as the eligibility criteria in the tender.

As noted hereinabove, the general terms and conditions/ eligibility in the tender notice stipulates that a minimum of 5 KM

length cable is to be supplied in the first six months, and the balance should be supplied within 12 months thereafter i.e in a total period of 18 months. While a miniscule quantity of 5 KM cable length is to be supplied in the first six months, the bulk of the supply of cables is required to be made within a period of 12 months thereafter. The entire work is required to be completed in 24 months which, as is evident from the contents of the counter-affidavit, includes laying, jointing, testing and commissioning of the underground cable lines, which part of the work can only be undertaken after the cables are supplied. As a bulk of the cables (of approximately 240 KM in length) is to be supplied within 12 months, the qualification requirement, which requires the bidder to have experience, in manufacture and supply of the schedule tendered quantity of 245 KM length 220 KV or higher voltage cables within a period of twelve months, cannot be said to be so arbitrary as to violate Article 14 of the Constitution of India. As a bulk of the cables of the required size and specifications (i.e for a length of 240 KM as against the total stipulated tender length of 245 KM) is required to be supplied within a span of 12 months (after the initial six months period when only 5 KM length cables are required to be supplied) the submission made on behalf of the appellants, that even if a manufacturer carries out the present tendered work, he would not be in a position to meet the qualification requirements of the same tender, is not tenable.

Manufacturers, who fulfill the qualification requirement of having manufactured and supplied 245 KM length 220 KV 1000 sq. mm copper conductor underground cables, in a continuous period of 12 months in the past seven years, constitute a class

distinct from others including the appellants who do not satisfy this qualification requirement. The question which necessitates examination is whether classification of such manufacturer satisfies the test of a valid classification under Article 14 of the Constitution of India. Article 14 forbids class legislation, and not a reasonable classification. Persons similarly situated must be similarly treated. Where, however, the persons are not similarly situated, there is no prohibition to treat them separately, provided that there is a reasonable nexus between the basis of the classification and the object sought to be achieved. (**K. Muthusamy v. Government of Tamilnadu**⁴⁶). The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly situated. The question is: what does this ambiguous and crucial phrase “similarly situated” mean? The test which has been evolved for this purpose is that the classification must be founded on an intelligible differentia which distinguishes certain persons or things that are grouped together from others, and that differentia must have a rational relation to the object sought to be achieved. (**Mohd. Shujat Ali v. Union of India**⁴⁷; **Dimapati Sadasiva Reddi, Vice-Chancellor, Osmania University v. Chancellor**⁴⁸; **Budhan Choudhry v. State of Bihar**⁴⁹; **Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar**⁵⁰). The classification may be founded on different basis. What is necessary is that there must be a nexus between the basis of the classification and the object under consideration. (**State of**

⁴⁶ LAWS -TLMAD 2003-0-582: MANU/TN/0192/2003

⁴⁷ AIR 1974 SC 1631

⁴⁸ AIR 1967 SC 1305

⁴⁹ (1955) 1 SCR 1045

⁵⁰ (1959) SCR 279

Maharashtra v. Indian Hotel & Restaurants Assn.⁵¹; **Budhan Choudhry**⁴⁹).

In order to establish that the protection of the equality clause has been denied to them, it is not enough for the appellants-writ petitioners to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with others. Discrimination is the essence of classification and does violence, to the constitutional guarantee of equality, only if it rests on an unreasonable basis. It is for the appellants-writ petitioners to show that the classification is unreasonable, and bears no rational nexus with its purported object. (**State of Jammu and Kashmir v. Triloki Nath Khosa**⁵²).

As shall be elaborated hereinafter, the appellants-writ petitioners' complaint of discrimination does not also merit acceptance. Every instance of discrimination does not necessarily fall within the ambit of Article 14 of the Constitution. Discrimination means an unjust and unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and unfavourable bias, an unfair classification. (**Rajasthan State Industrial Development & Investment Corporation v. Subhash Sindhi Coop. Hs. Society**⁵³; **The State of M.P. v. Narmada Bachao Andolan**⁵⁴; **Madhu Kishwar v. State of Bihar**⁵⁵). A valid classification based on a just objective is truly a valid discrimination. The result to be achieved by the just objective presupposes the choice of some for

⁵¹ (2013) 8 SCC 519

⁵² (1974) 1 SCC 19

⁵³ (2013) 5 SCC 427

⁵⁴ (2011) 7 SCC 639

⁵⁵ (1996) 5 SCC 125

differential consideration/treatment over others. Legalistically, the test for a valid classification may be summarized as a distinction, based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. (**Kallakkurichi Taluk Retired Officials Assn. v. State of T.N.**⁵⁶; **Indian Hotel & Restaurants Assn**⁵¹; **Triloki Nath Khosa**⁵²).

Classification of cable manufacturers having past experience of manufacture and supply of 245 KM length 220 KV 1000 sq. mm copper conductor underground cables, within a period of 12 months in the past seven years, has a rational nexus to the object of prescription of such a qualification requirement in the tender notice, since a bulk of the cables of the required length (i.e. 240 KM) and quality is required to be supplied within a period of 12 months, apart from a miniscule quantity of 5 KM which is required to be supplied in the first six months. The mere fact that the total period for completion of the work is stipulated as 24 months does not render the qualification requirement of past experience, of having supplied such cables of such length within a period of 12 months, arbitrary or illegal. As such classification of cable manufacturers satisfies the twin tests of a valid classification under Article 14 of the Constitution, the appellants' complaint of arbitrariness or discrimination does not merit acceptance.

A complaint, of violation of Article 14 of the Constitution, cannot be judged by adopting a doctrinaire approach. It is not prudent or pragmatic to insist on a mathematically accurate classification covering diverse situations and all possible

⁵⁶ (2013) 2 SCC 772

contingencies in view of the inherent complexities involved. (**State of Karnataka v. Mangalore University Non-Teaching Employees Association**⁵⁷). Classification, to be valid under Article 14, need not necessarily fall within an exact or a scientific formula for exclusion or inclusion of persons or things. There is no requirement of mathematical exactness for determining the validity, as long as it is not *palpably* arbitrary. (**Indian Hotel & Restaurants Assn**⁵¹; **Ram Krishna Dalmia**⁵⁰; **Welfare Association, A.R.P. v. Ranjit P.Gohili**⁵⁸; **Shashikant Laxman Kale v. Union of India**⁵⁹). The Executive enjoys considerable latitude, and exercises its power of classification enriched by its experience and taking into consideration myriad circumstances. (**Ombalika Das v. Hulisa Shaw**⁶⁰). Precision and arithmetical accuracy will not exist in any categorisation, and such precision and accuracy is not what Article 14 contemplates. As long as the broad features of the categorisation are identifiable and distinguishable, and the categorisation is reasonably connected with the object targeted, Article 14 does not forbid such a course of action. (**Subramanian Swamy v. Raju**⁶¹; **Murthy Match Works v. CCE**⁶²; **Roop Chand Adlakha v. DDA**⁶³; **Kartar Singh v. State of Punjab**⁶⁴; **Basheer v. State of Kerala**⁶⁵; **State of Madhya Pradesh v. Gopal D. Tirthani**⁶⁶; **B. Manmad Reddy v. Chandra Prakash**

⁵⁷ (2002) 3 SCC 302

⁵⁸ (2003) 9 SCC 358

⁵⁹ (1990) 4 SCC 366

⁶⁰ (2002) 4 SCC 539

⁶¹ (2014) 8 SCC 390

⁶² (1974) 4 SCC 428

⁶³ 1989 Suppl. (1) SCC 116

⁶⁴ (1994) 3 SCC 569

⁶⁵ (2004) 3 SCC 609

⁶⁶ (2003) 7 SCC 83

Reddy⁶⁷ and **Transport and Dock Workers Union v. Mumbai Port Trust**⁶⁸).

The test ought not to be what would be a 'better' basis for the categorization, for that would introduce subjectivity in the process. The test is whether categorization, on the basis adopted, results in hostile discrimination and adoption of the criteria has no reasonable nexus with the object sought to be achieved. (**Samaj Parivartana Samudaya v. State of Karnataka**⁶⁹). It is only where the decision is shown to be based on extraneous or irrelevant considerations or is actuated by malafides or is irrational and perverse or is manifestly wrong that the Court would reach out its lethal arm and strike down the decision. (**Mohd. Shujat Ali**⁴⁷).

In prescribing the qualification requirements in the tender notification, the 2nd respondent is entitled to have the freedom of contract and a free-play in the joints. The duty to act fairly will vary in extent, depending upon the nature of cases to which the said principle is sought to be applied. (**Tata Cellular**¹⁸; **Tejas Constructions & Infrastructure (P) Ltd.**²⁹). Prescription of the qualification requirement, of previous experience of manufacture and supply of cables, within a period of 12 months, when such cables are required to be supplied within a period of 18 months (a bulk of such supplies i.e 240 KM out of a total length of 245 KM is to be made within 12 months) is not so irrational as to attract the vice of discrimination and arbitrariness resulting in violation of Article 14 of the Constitution of India. Prescription of stringent qualification requirements as previous experience, even if it is more

⁶⁷ (2010) 3 SCC 314

⁶⁸ (2011) 2 SCC 575

⁶⁹ (2013) 8 SCC 154

than what is required for execution of the work, is in the interest of ensuring timely completion of the work. As the 2nd respondent is entitled for some free-play in the joints, and as it is neither practical nor pragmatic to insist on a mathematically accurate classification, prescription of the qualification requirement, regarding manufacture and supply of cables, cannot be faulted.

In any event it is not even the appellants case that they have the previous experience of manufacture and supply of 245 KM length 220 KV cables within a span of 18 or 24 months and, but for the qualification requirement of experience of supply within 12 months, would have been eligible to participate in the tender process. We see no reason, therefore, to hold such a qualification requirement as arbitrary and illegal, that too at the behest of the appellants who, on their own admission, not only do not fulfill the prescribed eligibility criteria, but do not even contend before us that, if the period of manufacture and supply is relaxed, they would possess the experience of having manufactured and supplied such cables of such length within a period of 18 or 24 months.

In the counter-affidavit, filed on behalf of the 2nd respondent by the Chief Engineer-Construction, it is stated that there are four manufacturers who have the experience to meet the eligibility criteria specified in the tender notification; they are (1) M/s. Iljin Cables Limited, South Korea; M/s. Taihan Cables Limited, South Korea; (3) M/s. Shenyhong Furukawa Cables Limited, China and (4) M/s. J. Power, Japan; M/s. Taihan Cables Limited, South Korea and M/s. Shenyhong Furukawa Cables Limited, China had earlier entered into a joint-venture agreement with Indian

companies, and had executed approximately similar nature and quantum of work of A.P. Transco; M/s. Iljin Cables Limited, South Korea had executed approximately similar nature of work in A.P. Transco during the years 2010-2012; M/s. J.Power, Japan had participated in the tenders floated by A.P. Transco, for similar nature and quantum of work in the past, claiming eligibility criteria equal to the present tender, but it could not become a successful bidder; A.P. Transco had awarded similar nature of work with a quantum of 182 KMs of 220 KV lines in addition to supply of 72.5 KMs of 132 KV lines as a single lot, and the said work was executed by M/s. Indu Projects Limited, Hyderabad with its joint venture partner M/s. L.S. Cables and Systems Limited, South Korea (the 4th respondent herein); in the recent past, similar nature of work, but of a lesser volume, was awarded by A.P. Transco to M/s. Rahul Cables Limited, Pune with the same eligibility criteria; another tender notification was issued by A.P. Transco in the recent past with the same eligibility criteria, however, for a lesser volume of work; and four bidders had submitted their bids which are under evaluation process. In the light of these assertions in the counter-affidavit filed on behalf of the 2nd respondent, the appellants contention, that the counter-affidavit does not disclose what a similar nature of work is, is not tenable. The very fact that both respondents 4 and M/s.Taihan Cables Limited, South Korea were found to have qualified, at the technical evaluation stage of the subject tender itself, would show that they had manufactured and supplied 245 KM or more length of 220 KV 1000 sq mm copper conductor underground cables in a span of 12 months during the last seven years.

The appellants rely on contracts entered into by other Transmission Corporations elsewhere in the Country to contend that none of those tender conditions specify the nature of cables to be supplied; and the prescription of supply of 220 KV 1000 sq. mm copper underground cables is over-specific. It is not in dispute that the underground cables to be laid, in execution of the subject work, is 1000 sq mm copper conductor underground cables. If such specification of cables, which the contractee requires, and which is what is intended to be used in the subject work, the action of the 2nd respondent, in specifying the qualification requirement of having previous experience, in the manufacture and supply of 1000 sq mm copper conductor underground cables, cannot be faulted as being over-specific. As long as the 2nd respondent intends laying 1000 sq mm copper conductor underground cables, in the subject work to be executed, the mere fact that cable specifications are not stipulated in tenders invited by other Transmission Corporations would not render the qualification requirement in the present tender notification, of manufacture and supply of 1000 sq mm copper conductor underground cables, arbitrary or irrational. If the 2nd respondent intends using 1000 sq mm copper conductor underground cables, then the qualification requirement of the bidder having experience in manufacture and supply of 1000 sq mm copper conductor underground cables cannot be set aside as being over-specific.

Let us now consider the judgments relied upon on behalf of the appellants. In **Dhingra Construction Co²**, the Municipal Corporation of Delhi had invited expression of interest from reputed technically and financially sound contractors. The

eligibility criteria, as stipulated, was that the bidders must have satisfactory performance of at least three similar completed works during the last three years of not less than Rs.490 lakhs each; or two similar completed works costing not less than Rs.600 lakhs; or one similar work costing not less than Rs.960 lakhs. The words “similar work” were defined as works of dense carpeting on roads and bridges i.e., Bituminous Macadam, Asphaltic concrete wearing course and semi-dense bituminous macadam and Mix seal surfacing.

The validity of this condition, stipulated in the invitation to tender, was subjected to challenge. It is in this context that a Division Bench of Delhi High Court observed:

“.....What has happened in the present case is that the basis [of similar works] has not been on any objective material, or after consideration of any estimate. Even this is not borne out from the record; we are left to surmise this. When the actual figures were made available along with the fact that only five firms (of whom two could not be regarded as eligible) had the requisite experience as per the impugned policy, and that the three eligible firms in the opinion of the committee could not possibly execute the works, the MCD nevertheless decided to proceed with the process of finalizing tenders for different works.

After giving our anxious consideration, we cannot but hold that the impugned policy, in effect subverts rather than sub serves the purpose of fair competition based upon a reasonable estimate of what constitutes similar works. It effectively eliminates a wider participation, and keeps out parties who are otherwise eligible, on unreasonable considerations. By drawing a very high threshold or eligibility condition (contained in Para 3 (viii), i.e three similar completed works during the last three years not less than Rs. 480 lakhs; or worth Rs. 6 crores each for two years or worth Rs. 9.6 crore in any one year) the impugned policy is unreasonable and arbitrary.

The public interest, in a fair competition, in this case, in our view, based upon a reasonable and fair assessment of all factors that are relevant, and germane, far outweighs the interest of the state agency in being left alone to formulate its policies, with sufficient "elbow room". **The considerations that seemed to weigh with MCD while fixing the criteria in the impugned policy, were based on non-existing, or irrelevant factors.** This led to elimination of a large number of tenderers, even though the actual estimated work was far less than Rs. 12 crores. **If the estimate for fixing similar works were based upon figures that had some semblance of relationship with the actual estimates, this result would not have ensued. The impugned condition in our view is based upon an assumption or conclusion so unreasonable which no reasonable authority or person could ever have come to having regard to the facts presented in this case.** Accordingly, we hold that the overwhelming public interest requires our intervention, under Article 226 of the Constitution.....” (emphasis supplied).

The Division Bench of the Delhi High Court, in **Dhingra Construction Co²**, held that the impugned condition was based upon an assumption or conclusion so unreasonable which no reasonable authority or person could ever have come to, having regard to the facts presented in the case; and overwhelming public interest required its intervention under Article 226 of the Constitution.

In **Gharda Chemicals Ltd³**, the eligibility criteria stipulated that tenders for chemicals would be accepted only from licensed technical-grade manufacturers who were actually manufacturing technical formulations, and had experience of at least 3 years manufacturing of ISI marked chemicals. It was contended before the Division Bench of the Delhi High Court that the condition, of *“at least three years experience of manufacturing ISI marked Chemicals”*, had been inserted by the Central Warehousing Corporation with the collateral motive of avoiding competitive bidding, and to ensure that the tender was awarded to M/s. Bayer Crop Science India Limited. It was in this context that the Division Bench of the Delhi High Court observed:

“.....Having considered the matter in the light of the material on record, including the original files, produced by learned counsel appearing for the CWC, **we are of the opinion that the insertion of the pre-qualification condition of "at least three years" manufacturing experience of ISI marked Chemical, is irrational and arbitrary and has absolutely no nexus with the stated object, namely, the quality and consistency of supplies, which is sought to be achieved by it.**

The guidelines highlight the fact that the purpose of any selection procedure is to attract the wider participation of reputed and capable firms. It emphasises that while framing any criteria, the scope and nature of work, experience of the firms in the same field and their financial soundness have to be kept in mind. In our view the illustrations given in para 3 of the afore-extracted memorandum, particularly sub para (v), which outlines a situation akin to the one in these proceedings, aptly apply in the instant case. Mercifully, the CWC who is equally bound by these guidelines, has shown ignorance of the memorandum. **At the sake of repetition, we may note that the eligibility criteria fixed in the instant case has resulted in disqualifying the remaining four manufacturers of the Chemical. Only one manufacturer, namely, Bayer Crop fulfills the criteria. Therefore, the fixation of the impugned eligibility criteria, without application of mind, is unreasonable,**

irrational and against the public interest. It has no nexus with the object sought to be achieved, namely quality assurance and consistency in supplies.

We are of the considered opinion that the decision of the CWC to insert the impugned pre-qualification criteria, is so unreasonable that having regard to the facts of the case, no reasonable authority could have ever come to and thus, attracting the doctrine of "Wednesbury" unreasonableness. We are, therefore, of the view that it is a fit case where this Court must intervene in the public interest....." (emphasis supplied)

In **Gharda Chemicals Ltd**³, the Division Bench of the Delhi High Court opined that insertion of the pre-qualification condition, of *"at least three years" manufacturing experience of ISI marked Chemical*", was irrational and arbitrary; it had absolutely no nexus with the stated object, namely, the quality and consistency of supplies; the eligibility criteria as fixed had resulted in disqualifying the remaining four manufacturers of the Chemical; only one manufacturer, namely, Bayer Crop fulfilled the criteria; fixation of the impugned eligibility criteria, without application of mind, was unreasonable, irrational and against public interest; it had no nexus with the object sought to be achieved, namely quality assurance and consistency in supplies; and the decision of the Central Warehousing Corporation, to insert the impugned pre-qualification criteria, was so unreasonable that, having regard to the facts of the case, no reasonable authority could have ever come to, thus attracting the doctrine of "Wednesbury" unreasonableness.

It is only if the qualification requirement stipulated in the impugned tender notification is held to have no rational nexus to the work, which the contractee seeks to have executed by the most eligible contractor, can the prescription of the qualification requirement be held to be so unreasonable that no reasonable authority could have stipulated such a condition, and the

Wednesbury test of unreasonableness would be attracted, justifying this Court's interference.

Where a party seeks to impeach the validity of a classification on the ground that it is so unreasonable as to offend Article 14, the burden is on him to plead and prove the infirmity, to set out facts necessary to sustain the plea of discrimination, and to adduce "cogent and convincing evidence" to prove those facts for "there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification". Unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show, by pleading and placing the necessary material before the Court, that the said classification is unreasonable and is violative of Article 14 of the Constitution. (**Triloki Nath Khosa**⁵²; **G.D. Kelkar v. Chief Controller of Imports and Exports**⁷⁰). The person assailing the classification "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences, (**Shri Sitaram Sugar Co. Ltd. v. Union of India**⁷¹; **Federal Power Commission v. Hope Gas Co.**⁷²), or that there has been a clear transgression of the constitutional principles. (**Ram Krishna Dalmia**⁵⁰; **Gauri Shanker v. Union of India**⁷³).

It is no part of the respondent's burden to justify the classification or to establish its constitutionality. (**Triloki Nath Khosa**⁵²). There is a presumption that the governmental action is reasonable and in public interest, and it is for the party

⁷⁰ AIR 1967 SC 839

⁷¹ (1990) 3 SCC 223

⁷² 320 US 591, 602 (1944)

⁷³ (1994) 6 SCC 349

challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one, and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government or its Corporations is unreasonable or against public interest because there are large number of considerations which necessarily weigh with the authorities in taking action. (**Villianur Iyarkkai Padukappu Maiyam v. Union of India**⁷⁴). The appellants-writ petitioners have failed to discharge the onus of establishing that prescribing the qualification requirement of experience in manufacture and supply of 1000 sq mm copper conductor underground cables is so wanting in reasonableness, and as being so unjust and unreasonable in its consequences, as to justify such prescription, of a qualification requirement, being set aside.

As it is not in dispute that the 2nd respondent intends using 245 KM length 220 KV 1000 sq mm copper conductor underground cables in the subject work, the contention that, globally, only voltage of the cable is prescribed, and not the specific metal and conductor size, would not justify the aforesaid qualification requirement being set aside. If what is sought to be used for the subject work is 245 KM length 220 KV 1000 sq. mm copper conductor underground cables, it does not stand to reason that this qualification requirement should be set aside in view of the possibility of a far and wide participation in the tender process being reduced. The challenge to these qualification requirements, prescribed in the tender notification, also necessitates rejection.

⁷⁴ (2009) 7 SCC 561

IV. DO THE APPELLANTS HAVE SUFFICIENT MANUFACTURING CAPACITY TO EXECUTE THE PROJECT?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would submit that the appellants have specifically pleaded, in the Writ Affidavit, that they have sufficient manufacturing capacity to execute the project floated by Respondent No.2; the respondents, in their counter-affidavits, have not denied or set up a case that the appellants do not have sufficient manufacturing capacity; and the respondent cannot be permitted to raise a plea, by way of an oral submission in a Writ Appeal, that the appellants do not have sufficient manufacturing capacity.

It is contended, on behalf of the respondents, that the 2nd appellants is stated to be a shareholder of the 1st appellant Company viz., M/s. Universal Cables Limited; in the affidavit, filed in support of the Writ Petition, it was stated in Para-7 that the 1st Petitioner is a company with vast experience in the power transmission and infrastructure sector; it is further stated at Para-8 that the 3rd Petitioner is a dominant player in power transmission, and has been manufacturing and supplying Extra High Voltage (EHV) cables of upto 220 KV for the last 7 years, including Under Ground (U/G) cable system on turnkey basis for power cables, and it has successfully undertaken various projects; it was not mentioned that the 1st appellant (1st Writ Petitioner company) is having manufacturing experience; it is also not stated anywhere, either in the affidavit filed in support of the Writ Petition or in the Writ Appeal, that the appellants have the qualification requirements, or at least the capacity to manufacture and supply

the required cables in a year; a belated attempt was made during the hearing of the appeal, and that too at the stage of reply, to contend that the 1st appellant has also manufactured cables; be that as it may, it was fairly conceded that the 1st appellant did not have the requisite qualification to participate in the bid; the imaginary grievance of the 1st appellant which, on its own admission, did not qualify for participating in the tender process, cannot be adjudicated in the appeal; the 1st appellant had, even during the pre-bid period, only wanted the tender to be split up into several packages so as to facilitate them to participate; and the Writ Appeal as filed is vexatious, and is liable to be dismissed *in limini* with exemplary costs.

The appellants herein had, no doubt, pleaded in their Writ affidavit that they had executed similar projects for renowned utilities in the country, and had furnished details of the names of such utilities. The fact, however, remains that, in its letter addressed to the Chief Engineer-Construction of the 2nd respondent on 25.05.2017, the appellants admitted that no Indian manufacturer, on its own credentials and experience, would be in a position to qualify for the subject tender; manufacturers like them, who had extensive similar experience with renowned utilities in the Country, would not be able to qualify; and, in order to ascertain the capacity of the firm to execute the work against the subject tender, the appropriate method should be through the number of vulcanization lines which the particular manufacturer was having, rather than the quantum of orders executed during a continuous period of 12 months, as India never had that kind of requirement in the past.

It is evident, from this letter addressed by them on 25.05.2017, that the 1st appellant does not possess the qualification requirements stipulated in the tender notification. The very fact that they chose to question the qualification requirements stipulated in the tender notification, in the present Writ proceedings, instead of participating in the tender, would show that they are aggrieved by prescription of such qualification requirements which disabled them from participating in the subject tender process. It is wholly unnecessary for us to delve on this aspect any further, as it is not even the appellants case that they fulfill the qualification requirement of having manufactured and supplied 245 KM length 220 KV 1000 sq. mm copper conductor underground cables, in a period of 12 months, during the past 7 years much less the experience of having laid such cables underground.

V. ARE THE QUALIFICATION REQUIREMENTS SO PRESCRIBED AS TO EXCLUDE ALL INDIAN MANUFACTURERS FROM PARTICIPATION?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, would submit that the Learned Single Judge has wrongly recorded a finding that Indian Companies had qualified for the QRs, on the basis of existence of Indian bidders in the three Joint-Ventures that had submitted their bids; the case of the appellants has always been that 'Indian Manufacturers' have been excluded because of the exaggerated conditions, and not bidders; and the three bids, received by Respondent No. 2, clearly show that no Indian manufacturer was technically qualified.

It is contended, on behalf of the respondents, that the possibility of absence of Indian competitors is irrelevant, and is not

sufficient ground to set aside the tender process; the judgment of the Supreme Court, in **Association of Registration Plates**⁶, illustrates this point, and is a complete answer to the argument that Indian manufacturers are excluded; respondent No. 2 was incurring a huge cost in an area which is relatively new to the Country; rather than experiment with persons, who claim to be capable of delivering the required quantity, the 2nd Respondent was well within its rights to choose from those who had, in fact, so delivered in the past; and if global competition is shut out, only for the reason that no Indian manufacturer has the requisite experience, the country will not be able to make progress.

The subject work is sought to be executed through a global tender process. On the appellants own showing, no work of this complexity and magnitude has been executed within the Country in the past. As the global invitation to tender, enabled foreign companies to also participate in the tender process, both foreign and Indian companies were entitled to participate in the bid process if they satisfied the prescribed qualification requirement. It is only with a view to have the work of laying 245 KM length 220 KV 1000 sq mm copper conductor underground cables, executed through a contractor with the necessary experience that the 2nd respondent invited global tenders and, merely because no Indian manufacturer has the required experience of executing a work of this size and magnitude, the 2nd respondent is not obligated in law to split up the work into different lots only to enable an Indian manufacturer to participate in the tender process though the 2nd respondent was satisfied, for just and valid reasons, that execution

of the subject work should be entrusted only to a single joint-venture.

In **Association of Registration Plates**⁶, the Supreme Court observed:-

“.....On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of a class of intending tenderer under Article 19 of the Constitution. **On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep out of field indigenous manufacturers.** It is explained that on the date of formulation of scheme in rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.....

.....**There is no material on record to infer any mala fide design on the part of the tendering authority to favour parties having foreign collaborations and keep out of fray indigenous manufacturers.** The high security plates is a sophisticated article - new for manufacturer in India. It is being introduced for the first time under the scheme contained in rule 50 of the Rules and the Act. **At the time of issuance of Notices of Tender, technical know-how for manufacture of plates and its further development was undoubtedly outside the country. Only a few concerns in India having collaboration with foreign parties possessed the expertise and were available in the market. The terms of the notice inviting tender were formulated after joint deliberations of Central and State Authorities and the available manufacturers in the field.** The terms of the tender prescribing quantum of turnover of its business and business in plates with fixation of long term period of the contract are said to have been incorporated to ensure uninterrupted supply of plates to a large number of existing vehicles within a period of two years and new vehicles for a long period in the coming years. **It is easy to allege but difficult to accept that terms of the Notices Inviting Tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because few manufacturers like the petitioners do not qualify to submit tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.....**” (emphasis supplied).

Just as in **Association of Registration of Plates**⁶, the subject tender is also not intended to keep away Indian manufacturers from competing in the tender process. The complexity of the work is such that no Indian cable manufacturer has come forward to participate in the tender process. In the absence of any law, which obligates the 2nd respondent to have the

subject work executed only through Indian manufacturers, their action in inviting global tenders, for having this complex work executed, cannot be faulted. As the eligibility criteria prescribed has a rational nexus with the nature of work sought to be executed, we find no merit in the submission, urged on behalf of the appellants, that the tender conditions have been so tailored as to exclude Indian manufacturers.

VI. WAS THE QUALIFICATION REQUIREMENT, OF SUB-STATION EXPERIENCE, PRESCRIBED ONLY TO BENEFIT RESPONDENT NO.5?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would submit that the Qualification Requirements were amended to permit Respondent No. 5 to participate as the lead bidder with sub-station work experience; the appellants have specifically contended that respondent No. 2 had issued an amendment, at the request of respondent No. 5, to allow it to participate in the tender as a lead bidder with experience in 220/110 KV Sub-Station works from a State/Central power utility, instead of the original QRs which provided for experience of 20 Km 220 KV cable; the appellants had contended that Respondent No. 5 did not have the requisite credentials of manufacturing and supplying the tendered cable, nor any experience of laying, installation and commissioning 220 KV cables, and is qualified only as a result of the amendment permitting reliance on sub-station work experience; the aforesaid QR, regarding sub-station work, has no nexus with the tendered work; it has been included only to permit Respondent No. 5 to participate as the lead bidder, along with Respondent No. 4; the respondents sought to rely on the QRs in the Tender floated by

Delhi Transco which permit sub-station experience; however, the QRs in the aforesaid Tender allow sub-station experience to be considered subject to the condition that underground cable laying must be under the supervision of the cable manufacturer, and require consent letters from the cable manufacturer for supervision of cable laying; unlike in the present scenario where Respondent No. 5 is qualified as a lead bidder solely on the basis of its sub-station experience; and the Learned Single Judge has not referred to or dealt with the aforesaid contention of the appellants.

It is contended, on behalf of the respondents, that, in the pre-bid meeting held on 18-05-2017, five prospective bidders, viz., M/s. Sterling & Wilson, M/s. Amar Raja Power Infrastructure Limited, M/s. Mega Engineering Pvt. Limited, M/s. GVPR Engineering Limited and M/s. KMV Limited, had requested the 2nd respondent to consider inclusion of 220 KV sub-station construction in the Qualification Requirement; considering their request, it was included as a Qualification Requirement, while giving replies to the queries on 20-09-2017; the bid discussion process spread over several days, and the queries raised by 18 bidders, and the reply of respondent No.2 thereto, were uploaded on the website of Respondent No. 2; there was thus a level playing field for one and all; as such the allegation, that the said inclusion of sub-station work is only to favour the 5th Respondent, is untrue and incorrect and has been made only to prejudice this Court; similar queries raised by various bidders, viz., M/s. Finolex J Power, Cable Corporation of India and M/s. Rahul Cables in the pre-bid meeting, were considered favourably by AP Transco, and necessary replies were given by relaxing and adding certain

conditions in the tender; there is no truth in the allegation that AP Transco has amended the condition, by adding sub-station experience as QR, only to favour R-5; sub-station experience is the highest, in terms of qualification, for the type of work which had been tendered for; the tender condition in Delhi, which the appellants had exhibited for illustrating some other point, in fact shows that bidders with such experience were also permitted; once the sub-station experience is regarded as relevant, at least by other public utilities, it cannot be alleged that Respondent No. 2 had introduced this condition only to favour respondent No. 5; in the counter-affidavit of respondent No. 5, specific instances of the insertion of this condition, assisting other bidders, is also spoken of; this condition is, per se, not irrational or arbitrary; all the participants had prior knowledge of the QR amendment even before the bid submission date; this condition also enabled certain other parties to bid; no prejudice was caused to the appellants by introduction of the said clause; as a result of this condition, the eligibility of the appellants was not taken away; and, as the appellants-company is not even an eligible player, they cannot complain of decrease in competition thereby.

It is necessary to note that, in the pre-bid meetings, clarifications were sought by several interested bidders such as Cable Corporation of India Limited; M/s. Energy Power Cables; Far East, China; Finolex Power Systems Private Limited; M/s. G.V.P.L (5th respondent); KEI Industries Limited (Writ Petitioner No.3); Larson and Toubro; Rahul Cables Private Limited; M/s. Sterling and Wilson Pvt Ltd; M/s. Sudkable GmbH; M/s. Tata Projects Ltd; TBEA; Universal Cables (appellant); Vijai Electricals Ltd. etc.

With regards the qualification requirement, that the lead partner should have completed 20 KMs 220 KV or above grade 1000 sq. mm copper or above size cables, the 5th respondent had sought a clarification whether this qualification requirement could be so revised that the lead partner should have completed 20 KM of 220 KV or above grade 1000 sq mm copper or above size **or** 220/110 KV sub-station works from a State or central power utility. While the earlier requirement was for the lead partner of the joint venture to have completed the requirement of having completed 20 KM 220 KV or above grade 1000 sq. mm copper or above size cables, the 5th respondent requested the 2nd respondent to revise and include, as an alternative, the qualification requirement for the lead partner to have experience in 220/110 KV Sub-Station works from State/Central power utilities.

As is submitted by the Learned Advocate-General, appearing on behalf of the 2nd respondent, it is not only the 5th respondent, but four other prospective bidders i.e M/s. Sterling & Wilson, M/s. Amar Raja Power Infrastructure Limited, M/s. Mega Engineering Pvt. Limited, and M/s. KMV Limited which had, in the pre-bid meeting held on 18.05.2017, requested the 2nd respondent to consider inclusion of 220 KV sub-station construction experience as an alternative qualification requirement. Their request was favourably considered by the 2nd respondent, and sub-station experience was included as an alternative experience for the lead bidder.

The authority, inviting tenders, can grant relaxation for bonafide and cogent reasons provided such relaxation is permissible under the terms governing the tender process. **(Maa**

Binda Express Carrier¹⁷⁾. This request for inclusion of sub-station experience, along with several others, was considered by the 2nd respondent which accepted some and rejected others. However each of the queries, seeking amendment of the qualification requirements, were answered and up-loaded on the web-site of the 2nd respondent by 20.09.2017 itself, long before the last date for submission of bids on 30.10.2017. Consequently all bidders, who had experience in sub-station work, were also eligible to participate as the lead bidder of a consortium or as part of a joint-venture of two companies provided, of course, that the other member of the consortium or the joint venture satisfied the requirement of manufacturing and supplying 245 KM length 220 KV 1000 sq. mm copper conductor underground cables within a period of 12 months during the past seven years.

The type of work, as detailed in the tender notification even as originally issued, related to *“extra high tension sub-station and lines”*. Though the type of work also related to sub-stations, such experience was not initially prescribed as a qualification requirement. This prescription, made pursuant to the request of certain prospective bidders in the pre-bid meeting held on 18.05.2017, is not wholly unconnected with the work to be executed. As noted hereinabove the qualification requirement prescribed in the subject tender was that the manufacturer must have designed, manufactured, tested and supplied atleast 100% of the total tendered quantity (i.e 245 KM) of 220 KV cables indicated in the schedule in a continuous period of 12 months; and the number of partners in the joint-venture was restricted to two parties. It sufficed, to comply with the qualification requirement, if

the other partner of the joint-venture fulfilled the requirement of qualification experience and, as the 4th respondent had the stipulated experience in this regard, it mattered little whether or not the lead bidder of the joint-venture also fulfilled this requirement.

As is admitted even by the appellants, sub-station experience was prescribed in the tender floated by Delhi Transco also. The appellants' contention that, in the tender floated by the Delhi Transco, a condition was stipulated that the underground cable laying must be under the supervision of the cable manufacturer, is not materially different as, in the present case also, the 4th respondent, which is part of the joint venture executing the work, fulfills the qualification requirement of having manufactured and supplied 245 KM length 220 KV 1000 sq. mm copper conductor cables. The 4th respondent, as a joint-venture partner, would be actually involved in the laying of the cables, and not merely in its supervision. The credentials of the other member of the joint venture would enure to the benefit of the lead bidder also. In any event, it is not as if the appellants would have fulfilled the prescribed eligibility criteria even if this alternative qualification requirement is deleted. We see no reason, therefore, to set aside the tender notification on this ground.

VII. WAS THE QUALIFICATION REQUIREMENT, OF A SUBSIDIARY HAVING ONLY 2KM OF 220 KV CABLE EXPERIENCE IRRATIONAL, AND WAS IT PRESCRIBED ONLY TO BENEFIT RESPONDENT NOS.3 AND 4?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, would submit that the QRs permitted overseas manufacturers, who have a subsidiary plant or sister

concern in any country, to supply from such plants provided that a minimum of 2 km of 220 KV or above voltage 1000 Sq mm copper cables had been supplied from such a plant, and the same should be in operation for more than 2 years; the appellants have put in issue the aforesaid QR in their Writ Affidavit, and have stated that the QRs are unequal and discriminatory as they lay down a very relaxed criteria for subsidiaries/sister concerns/plants of overseas manufacturers; the appellants, in their rejoinder, have specifically pleaded that the aforesaid QR was specifically included to enable LS Cables to supply cables from its Indian subsidiary plant; the appellants have also pleaded, in their rejoinder, that the other two manufacturers who have submitted bids do not have a subsidiary in India, and this would allow LS Cables to submit competitive financial bids by avoiding taxes and duties; respondent Nos. 3 & 4, in their counter-affidavit, have replied to the aforesaid averment in the rejoinder filed by the appellants; respondent No.4 has not taken the stand that it does not intend to source its supply from its Indian subsidiary (Respondent No. 3), and has only said that it is not obligatory on their part to make supply from their plant in India; and the Learned Single Judge has not considered the aforesaid contention of the appellants.

It is contended, on behalf of the respondents, that the intention of AP Transco, in stipulating the said condition, is to ensure the quality of the cable supplied from such plant of the overseas manufacturer of the cable; only for the purpose of ascertaining the quality of the product of the overseas manufacturer, was the qualification requirement of a minimum of 2 KM incorporated; there is no other reason to stipulate this

condition, except to ensure the quality of the product to be supplied; this allegation has been invented by the appellants only to mislead this Court, as if it is a tailor-made condition; there are no *mala fides* in stipulating this condition; the appellants have twisted and torn this QR out of context; in the first instance, the this QR is not confined to subsidiaries alone, but includes the tenderer's own plant, subsidiary plant or sister concern plant; the thrust of the argument of the appellants is premised on Respondent No. 3 being an Indian subsidiary of Respondent No. 4; secondly, the sourcing can be from any country and not just India; therefore, neither the jural relationship between a bidder and its related entity nor the country is so designed, as to support the argument that this condition was designed to suit or favour Respondent No. 3 or Respondent No. 4; more importantly this is only a facility which enables sourcing from a different plant, but does not mandate it as a condition; and the allegation that this would reduce the cost of Respondent No. 4 is also contrary to the pleading elsewhere that the tender discourages the "Make In India" concept.

The subject clause reads as under:-

"Overseas manufacturer who qualify as per above and who is having his own plant/subsidiary plant/or sister concern plant in any country can supply cables from such plants provided a minimum of 2 KM of 220 KV or above voltage 1000 sqmm copper or above size cable have been supplied from such plant and the same should be in operation for more than 2 years".

As is evident from the afore-extracted clause, it is only overseas manufacturers, who fulfill the qualification requirement of having previous experience of having manufactured and supplied 245 KM length 220 KV 1000 sq. mm copper conductor underground cables, within a period of 12 months in the past 7

years, who are permitted to effect supplies for the subject work through their subsidiary, provided the subsidiary has the experience of having supplied a minimum 2 KM 220 KV or above voltage 1000 sq mm copper cables from its plant, and the said plant has been in operation for more than 2 years.

In this context it is useful to note that M/s.Sudkable CmbH had informed the 2nd respondent, during the pre-bid meetings, that no Indian Company could be a sister concern of an overseas manufacturer in terms of the Indian Companies Act. In reply thereto, the 2nd respondent had clarified that if, in the subsidiary company in India, the overseas company had an equity of more than 50%, then the Principal Company's qualification would be considered.

It is no doubt true that the prescription of merely 2 KMs cables, as the qualification requirement of a subsidiary, is miniscule when compared to the total requirement of 245 KM length of cables. Learned Advocate-General would, however, submit that this prescription is only to ensure the quality of product to be supplied, by the original manufacturer, through its subsidiary. While this submission, made by the Learned Advocate-General, does not appear to be supported by a specific plea in the counter-affidavit filed on behalf of the 2nd respondent, the basis of the classification of persons or things can always be gathered from surrounding circumstances known to, or brought to the notice of, the Court. Relevant material is always admissible to show the reason and the justification for the classification. (**Ram Krishna Dalmia**⁵⁰; **Gauri Shanker**⁷³).

All that the aforesaid clause permits is for the qualified overseas manufacturer to supply cables through its subsidiary anywhere in the world, and not merely through its subsidiary in India. While the qualification requirement of the overseas manufacturer has not been relaxed, and only those who possess the previous experience of having manufactured and supplied 245 KM length 220 KV 1000 sq mm copper conductor underground cables, within a period of 12 months in the preceding 7 years, were alone eligible to participate in the tender process, the selected bidder has been permitted to effect supplies through its subsidiary, provided the subsidiary has the experience of having supplied a minimum of 2 KM 220 KV 1000 sq mm copper cables.

While Sri S. Ravi, Learned Senior Counsel appearing on behalf of respondents 3 to 5, would contend that the 3rd respondent has the capacity to manufacture and supply cables far in excess of what is stipulated in the tender conditions for a subsidiary, it is wholly unnecessary for us to delve into this aspect. As the selected bidder is required to supply 245 KM length 220 KV 1000 sq mm copper conductor cables, if the Indian subsidiary of the overseas manufacturers is merely capable of supplying 2 KM length cable of the required specifications, it would only mean that the balance 243 KM length cables would be required to be supplied by the selected manufacturer from its own plant. The aforesaid clause enables supplies to be effected by the overseas manufacturer either through its subsidiary or from its own plant, and does not dilute the qualification requirement for the joint venture to possess the stipulated QR, of previous experience, to show that they are capable of executing the subject work. The

qualification requirements are prescribed to ensure that the selected tenderer has the capacity and the capability of manufacturing and effecting supplies of the cables required for the subject work. It matters little whether the overseas manufacturer effects supply of these cables from its own plant/its subsidiary plant or sister concern plant. In any event, the appellants cannot have any grievance in this regard, for even if this QR is deleted, they would still have been ineligible to participate in the tender process. This contention, urged on behalf of the appellants, does not also merit acceptance.

VIII. APPELLANTS ALLEGATION OF PREVIOUS HISTORY OF COLLUSION BETWEEN RESPONDENT NO.4 AND ONE OF THE OTHER TECHNICALLY QUALIFIED TENDERER:

While a feeble submission was put forth, on behalf of the appellants, that another tenderer, i.e M/s.Taihan Electric Wire Company Limited, lacked the prescribed financial capacity to participate in the bid, and therefore the 4th respondent was the sole eligible bidder, it was submitted on behalf of the respondents that A.P. Transco had analyzed the financial statements furnished by M/s.Taihan Electric Wire Company Limited, and after examining the said statements, AP Transco sought clarification with regards their profitability; the said company submitted a statement of profitability, issued by their auditors, to the effect that the said company earned profits during the financial years 2012 to 2016; thereafter, the said company's technical bid was declared as qualified, and their price bid was opened; and the allegations made by the appellants were not only factually incorrect, but were also made with an ulterior motive. This contention was not seriously pursued by the appellants thereafter,

as is evident from the fact that they do not form part of the written submissions filed on their behalf. As M/s.Taihan & Co appears to have fulfilled the technical and financial conditions stipulated in the notice inviting tenders, there was atleast one more bidder, other than the joint-venture of respondents 4 and 5, which fulfilled the prescribed qualification requirements. The contention that the qualification requirements were tailor made, only to suit the qualifications of respondents 3 to 5 does not, therefore, merit acceptance.

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants, would however contend that respondent Nos. 3 & 4 have a past history of collusion and bid rigging; the appellants became aware of the fact that there were three bidders including Taihan, well after the filing of the Writ Petition; the appellants, in their rejoinder affidavit, have clearly averred that respondent No. 4 & Taihan have been fined for collusion, in bidding processes, by the Fair Trade Commission of South Korea, and by the Anti-trust Regulator of the European Commission; the rejoinder-affidavit forms part of the pleadings, and the Court is bound to consider them; Rule 12(i)(b) of the Writ Proceedings Rules, 1977 also permit the appellants to file reply affidavits without seeking leave of the Court; moreover, Respondent Nos.3 & 4 have specifically replied, to the pleadings in the rejoinder, in their counter-affidavit; they cannot contend, at this stage, that the pleadings in the rejoinder should not be considered; the bid submitted by Taihan & Co. is a mere eyewash, and illusion to manufacture competition; admittedly, the bid by L&T and Sudkabel has not been technically qualified; in the light of the fact

that LS Cables & Taihan have been found to be guilty of collusion in two other jurisdictions, their bid is highly suspect; respondent Nos.3 & 4, in their counter-affidavit, have not specifically denied the fact that they have been found guilty of bid rigging in two other jurisdictions; and the Learned Single Judge has failed to even refer to the aforesaid contention in the Order under appeal, even though it was specifically raised in the rejoinder, and was sought to be addressed in the reply/counter to the rejoinder. Learned Senior Counsel would rely on **Sri-la-Sri Subramana Desika Gnanasambanda Pandarasannadhi v. State of Madras**⁷⁵ and **K. Srinivas Rao v. Union of India**⁷⁶.

It is contended, on behalf of the 2nd respondent, that AP Transco has not received any complaint from any quarter against these bidders; moreover, they have not suffered any disqualification stipulated under the tender conditions; the bid filed by the 5th Respondent was therefore declared as responsive, and its price bid was opened; the allegations made by the appellants in this regard are untrue and incorrect; AP Transco has followed the tender conditions scrupulously in finalizing the tender; the appellants have failed to raise any substantial grounds necessitating interference of this Court under its extraordinary jurisdiction; a feeble attempt is made to throw mud at Respondent No. 4, by exhibiting documents of alleged collusion in other jurisdictions elsewhere in the world; it has not been shown to this Court which tender condition would be infringed even if it is assumed that the allegations are true; and at any rate there is no

⁷⁵ AIR 1965 SC 1578

⁷⁶ 2002 (5) ALD 510

whisper of collusion between Taihan and Respondent No. 4 in the present bidding process.

It is no doubt true that, in the light of the practice adopted by this Court, reply affidavits, in the nature of a rejoinder, form part of the pleadings. (**K.Srinivas Rao**⁷⁶). It is also true that a written statement filed in a Suit is 'pleading'; rejoinder, if received, would also be 'pleading' within the meaning of Order 6 CPC; and, since pleadings form part of the record, they can be taken into consideration. (**Nicholas Piramal India Ltd v. Cultor Food Science Inc**⁷⁷).

In **Sri-la-Sri Subramana Desika Gnanasambanda Pandarasannadhi**⁷⁵, the Supreme Court observed:-

“..... That takes us to the consideration of the question as to whether the two reasons given by the High Court in support of this decision are valid. **The first reason, as we have already indicated, is that the High Court thought that the plea in question had not been raised by the appellants in his writ petition. This reason is no doubt, technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellants in support of his petition; but in the affidavit-in-rejoinder filed by the appellants, this plea has been expressly taken. This is not disputed by Mr Chetty, and so, when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellants challenged the validity of the impugned Order was that he had not been given a chance to show cause why the said notification should not be issued. We are, therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellants before the matter was argued before the High Court.....**” (emphasis supplied).

It must, however, not be lost sight of that there is a distinction between a pleading under the Code of Civil Procedure and a Writ Petition. While, in a plaint, the facts and not evidence are required to be pleaded, in a Writ Petition not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. When a point, which is ostensibly a point of law, is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by

⁷⁷ 2003 (1) ALD 64

evidence which must appear from the writ petition. If the facts are not pleaded, or the evidence in support of such facts, is not annexed to the writ petition, the Court will not entertain the point.

(Bharat Singh v. State of Haryana⁷⁸).

While the Writ Proceedings Rules, no doubt, permit reply affidavits to be filed, any new fact stated in the reply affidavit, which has not been put forth in the writ affidavit, would result in the respondents being denied the opportunity of rebutting the same. While the reply affidavit can undoubtedly deal with the facts stated in the counter affidavit, a completely new fact, which has not even been stated in the affidavit filed in support of the writ petition, cannot, ordinarily, be stated for the first time in the reply affidavit.

We see no reason, however, to dwell on this issue any further, as this contention has been urged, on behalf of the appellants, only in support of their claim that the 4th respondent is the only overseas manufacturer which possesses the prescribed qualification requirements. The fact that M/s. Taihan and Company was also found to have technically qualified in the tender process would show that the 4th respondent is not the only manufacturer which fulfils the prescribed technical qualification requirements. It is not even the applicant's case that M/s. Taihan and Company and the 4th respondent had colluded in submitting their bids pursuant to the subject tender notification. It would be wholly inappropriate for this Court to examine the appellants allegation of their collusion in other jurisdictions, as M/s. Taihan and Company has not even been arrayed as a respondent in the

⁷⁸ (1988) 4 SCC 534

present writ petition. No finding adverse to them can be recorded, behind their back, without giving them an opportunity of being heard. Suffice it to make it clear that the order now passed by us shall not disable the appellants, if they have sufficient proof of collusion in the subject tender process, to bring it to the notice of the concerned authorities for necessary action to be taken by them in accordance with law.

IX. WOULD PRESCRIPTION OF THE QUALIFICATION REQUIREMENTS, WHEN READ CUMULATIVELY, SHOW THAT THEY ARE CONDITIONS TAILOR MADE TO SUIT RESPONDENTS 3 TO 5?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would submit that the allegations made by the appellants, in the Writ Petition filed by them prior to the submission of bids, have turned out to be true; the appellants had filed the Writ Petition much prior to the date of submission of the bids, and had obtained an interim order not to open the price bids; during the course of hearing of the Writ Petition, the appellants allegations, in its Writ Affidavit, have turned out to be true; as alleged by the appellants, respondent Nos.4 & 5 have combined to submit a joint-bid, and have also been selected as the lowest bidder; the very fact that these allegations, made prior to the submission of the bids, have come true would create a suspicion in the mind of this Court while exercising its power of judicial review to test the Qualification Requirements; while each of the above factors, individually, may not establish that the Qualification Requirements are tailor made to favour respondents 3 to 5, all the factors, when read in conjunction, show-case a clear design on the part of respondent No.2 to tailor

the Qualification Requirements to suit respondents 3 to 5, and to award the contract to Respondents 4 & 5; the subject matter of the tender is, undisputably, a matter relating to State largesse; such State largesse is to be dealt with by ensuring a level playing field, and to be granted in a fair and equitable manner; a well recognized deviation, to the requirement of ensuring a level playing field, is the vice of prescription of tailor made conditions; tailor made conditions need not be irrational *ex-facie*, as seeming rationality may be used as a cloak to achieve a pre-ordained result; if, ostensibly rational, decisions are revealed to be designed conditions, specifically tailored to suit any one bidder, it would constitute a tailor made condition; the allegations of tailor made conditions ought, therefore, to be judged in the facts peculiar to each case; the cumulative circumstances, referred to hereinafter, would clearly bear out that the State, with an intent to favour respondent Nos.4 and 5, has prescribed a seemingly rational condition of manufacture of 245 KM length cables experience of certain specifications; however, when combined with the dilution of conditions to favor R-5 (with sub-station experience) and R-3 (with 2 Km. sufficient experience), they denote a design to make the manufacturer experience conditions disproportionate or, on a cumulative basis, irrational; and the sub-station experience and 2 Km. specifications, combined with the intransigent insistence of manufacturing experience of the entire 245 Km, shows that insistence on the 245 Km. experience is purely a cloak and an effort to use an ostensibly rational parameter to exclusively suit R-4 and R-5 (and also to benefit R-3). Learned Senior Counsel would rely on **Bharat Biotech International Limited**¹ in this regard.

As noted hereinabove, tenders were invited for supply, erection, testing and commissioning, including civil works, cable systems of 245 KM length 220 KV 1000 sq. mm copper cables in the Capital Region of Amaravathi in the Guntur District of the State of Andhra Pradesh. The existing high tension over-head extra high tension lines, which criss-cross the Capital Region in four different routes, are sought, by the impugned work, to be replaced by underground cables being laid instead. The fact that the quantity required to be supplied is of a length of 245 KM of 220 KV cables is not in dispute. It is also not in dispute that the 2nd respondent intends to use 1000 sq mm copper conductor extra high tension cables as underground cables in the subject work. It is not even the case of the appellants that the 4th respondent, a South Korean Company, does not fulfill the prescribed eligibility criteria. The fact that the 4th respondent has the experience of having earlier executed similar nature of work, is also not in dispute. It is in the light of these undisputed facts are we required to examine the contention, urged on behalf of the appellants, that the qualification requirements, stipulated in the tender notice, are tailor made to suit respondents 3 to 5.

In considering whether this contention merits acceptance, we must first understand what the expression “*tailor made conditions*” actually mean? The words “tailor made” mean something designed for a specific person. Tailor made conditions are those prescribed by the contractee to suit the qualifications of a pre-identified bidder, and the empty ritual of a tender process is undertaken to present the picture of a fair and transparent process of selection of the best tenderer, though, in fact, the outcome of the

tender process is pre-determined, and the tender conditions are so specified as to ensure that the pre-determined bidder alone fulfills the prescribed eligibility criteria, and in being selected for execution of the work. This vice is attracted where prescription of tender conditions is for the extraneous reason of selecting a pre-identified bidder, and to eliminate free and fair competition. By resort to this process all others, who may have otherwise been eligible to participate in the tender, are sought to be unfairly eliminated.

Even if we were to ignore the fact that one other tenderer was found to have technically qualified in the subject tender, the question which would necessitate examination is whether this vice, of prescription of tailor made conditions, can be said to apply in cases where there is only one person available to execute the tendered work, and it is they alone who satisfy the eligibility criteria prescribed bonafide by the tender issuing authority?

A law, even if it relates to a single individual, would be constitutional if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual can be treated as a class by himself. (**Ram Krishna Dalmia**⁵⁰; **State of Orissa v. Bhupendra Kumar Bose**⁷⁹; **Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan**⁸⁰). A law, applicable only to one person or one class of persons, is constitutionally valid if there is sufficient basis or reason for it. (**Lachhman Dass v. State of Punjab**⁸¹; **Professor Willis : Constitutional Law p. 580; Chiranjit Lal Chowdhury v. Union**

⁷⁹ 1962 Supp (2) SCR 380 : AIR 1962 SC 945

⁸⁰ (1964) 1 SCR 561 : AIR 1963 SC 1638

⁸¹ (1963) 2 SCR 353 : AIR 1963 SC 222

of India⁸²). A single institution is capable of being treated as a class by itself for the purpose of legislation, and if there are special circumstances or reasons which are applicable to that institution, the legislation would not incur the wrath of Article 14. (**S.P. Mittal v. Union of India**⁸³; **Dharam Dutt v. Union of India**⁸⁴).

In **Bira Kishore Deb v. State of Orissa**⁸⁵, the Supreme Court observed:-

“.....There was no denial of the special importance of the Temple as averred on behalf of the State and we have no doubt therefore that this Temple stands in a class by itself in the State of Orissa and therefore requires special treatment. We may in this connection refer to the decision of this Court in **Tilkayat Shri Govindlalji v. State of Rajasthan**¹ where in relation to the temple at Nathdwara with respect to which a special Act had been passed by the State of Rajasthan, this Court observed that “a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself”. The attack under Article 14 on the constitutionality of the law with respect to the temple at Nathdwara was repelled on the ground that the temple had a unique position amongst the Hindu shrines in the State of Rajasthan and no temple could be regarded as comparable with it. The same reasons in our opinion apply to the Temple in the present case and the Act cannot be struck down under Article 14 because the Temple in the present case holds a unique position amongst the Hindu temples in the State of Orissa and no other temple can be regarded as comparable with it.....”

In **S.P. Mittal**⁸³, it was contended before the Supreme Court that, if the management of the subject institution had been taken over by the Government on the ground of mismanagement, there may be other institutions where a similar situation may be prevailing; and there should have been a general legislation rather than singling out the subject institution i.e Sri Aurobindo Society for hostile treatment. It is in this context that the Supreme Court observed:-

“.....the argument cannot be accepted for two reasons. Firstly, because it has not been pointed out which were the other institutions where similar situations were prevailing. **Besides, there is a uniqueness with this institution in as much as the Government is also involved. Even a single institution may be taken as a class. The situation prevailing in the**

⁸² AIR 1951 SCD 41 = 1950 SCR 869

⁸³ (1983) 1 SCC 51

⁸⁴ (2004) 1 SCC 712

⁸⁵ (1964) 7 SCR 32 : AIR 1964 SC 1501

Auroville had converted the dream of the Mother into a nightmare. There had arisen acute law and order situation in the Auroville, numerous cases were pending against various foreigners, the funds meant for the Auroville had been diverted towards other purposes and the atmosphere was getting out of hand. In the circumstances the Government intervened and promulgated the Ordinance and later on substituted it by the impugned enactment. It cannot be said that it is violative of Article 14 on that account.....” (emphasis supplied).

In **Lachhman Dass**⁸¹, the Supreme Court held that it cannot be disputed that the impugned Act and the rules framed thereunder put Patiala State Bank in a position different from that of the other Banks under the ordinary law; the question was whether this difference amounted to discrimination under Article 14; a Bank established by a State had distinctive features which differentiated it from the other Banks, and for the purpose of Article 14 it formed a category in itself; while Article 14 prohibited discriminatory legislation directed against one individual or class of individuals, it did not forbid reasonable classification; and for this purpose even one person or a group of persons could be a class.

In **Food Corpn. of India v. State of Kerala**⁸⁶, the Supreme Court observed:-

“....Now coming to the fourth proposition, the grievance appears to be that the appellants have been singled out for harsh treatment and there was no other dealer in foodgrains in the State of U.P. whose annual turnover would exceed Rs 10 crores. **It is now well settled that it is within the competency of the State Legislature to classify the dealers and to impose surcharge upon those who were placed in one category taking into consideration their economic superiority....”**

Even in cases where the classification is not by way of legislation, it has been held that action taken in favour of, or against, a single individual would satisfy the requirement of Article 14 if the single individual is a class by himself. In **State of J & K v. Bakshi Gulam Mohd**⁸⁷, the Supreme Court observed:-

⁸⁶ (1997) 3 SCC 410

⁸⁷ 1966 Supp SCR 401 : AIR 1967 SC 122

“.....The next ground of attack on the notification was based on Article 14. It was said that most of the matters into which the Commission had been directed to inquire formed the subject-matters of Cabinet decisions. It was pointed out that since such matters are confidential and no one is allowed to divulge in what way the Members of the Cabinet voted on them, it must be held that they were all equally responsible for the acts sanctioned. That being so, it was contended that by picking Bakshi Ghulam Mohammad out of the entire Cabinet for the purpose of the inquiry the Government had discriminated against him in a hostile way. It was contended that the notification must be set aside on that ground. We find this contention untenable. The inquiry is in respect of wealth acquired by Bakshi Ghulam Mohammad and his friends and relatives by misuse of his official position. It would be strange if all the Members of the Cabinet voluntarily abused their office for putting money into the pockets of Bakshi Ghulam Mohammad and his friends. **Let us, however, assume that all the Members of the Cabinet assisted Bakshi Ghulam Mohammad in doing this. It is however not said that other members had acquired wealth by these acts. He was, therefore, in a class by himself. This classification has further a rational connection with the setting up of the Commission, for the object is to find out whether the wealth had been acquired by Bakshi Ghulam Mohammad by the abuse of official position.....**” (emphasis supplied).

It is settled law, therefore, that a single person can form a class by himself and, while deciding the question of violation of Article 14, what is required to be ascertained is whether there is any reasonable basis on which a single person or a group of persons are differentiated from others, and whether there is any rational relation between such differentiation and the object sought to be achieved. In other words, **what** is necessary to satisfy the test of Article 14, even in cases where a single individual or institution is singled out for differential treatment, is that there must be a rational nexus between the basis of the classification and the object sought to be achieved thereby. **(Kshetriya Kisan Gramin Bank v. D.B. Sharma⁸⁸).**

The object of this ambitious project, which the Government of Andhra Pradesh has undertaken through A.P. Transco, is to replace the extra high tension overhead cables, which criss-cross the Capital Region of Amaravathi in Guntur District on all four sides, with underground 220 KV 1000 sq mm copper conductor cables of 245 KM length. The very fact that there is no Indian

⁸⁸ (2001) 1 SCC 353 : 2001 SCC (L&S) 1000

manufacturer, which possesses the required expertise to execute the subject work, is proof that a very high degree of experience and expertise is required to execute it.

While the 2nd respondent claims that four companies in the world possess the required experience and expertise to execute the subject work, we shall, in examining this contention urged on behalf of the appellants, presume that it is the fourth respondent alone which satisfies the prescribed technical eligibility criteria or the qualification requirement prescribed in the tender notification. Hypothetically, if only one company in the entire world has the expertise required to execute the subject work, and the bonafides of the 2nd respondent in seeking to have such a work executed is not in dispute, can it then also be held that the stipulated tender conditions are tailor made? The answer can only be in the negative.

In order to satisfy the test of Article 14, the prescribed qualification requirement should have a rational nexus with the object sought to be achieved by such a stipulation in the notice inviting tenders. If the expertise required to execute the work is available only with a single company or with a select few, and the tender conditions are prescribed with the bonafide object of having such a work executed, it cannot be said that the conditions prescribed, for execution of such a work, are tailor made. The vice of prescription of tailor made conditions would be attracted only where conditions, though not actually required for execution of the work, are prescribed only with a view to eliminate all competition, and to favour a pre-identified tenderer. If, on the other hand, manufacture, supply and laying of these underground

cables can be undertaken only by the 4th respondent or by a select few, and others including the appellants herein do not possess the required expertise, it cannot then be contended that entrustment of the work to the sole expert in the field, or any one of the select few, would still attract the vice of prescription of tailor made conditions denying a level playing field to manufacturers of cables not of the prescribed size, quality or length, but of cables of a different size and make.

The mere fact that the appellants had filed the present writ petition, even before finalisation of the bids, alleging that the tender work would be awarded to respondents 3 to 5 matters little, as it is not in dispute that the 4th respondent fulfils the stipulated qualification requirement regarding previous experience in manufacturing and supplying cables of the quantity and quality required to be utilised in the subject work. 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. (**Michigan Rubber (India) Ltd**⁴; **Association of Registration Plates**⁶). The past record of the tenderers, the quality of the services offered, assessing such quality on the basis of the past performance of the tenderers, their market reputation, etc all play an important role in deciding to whom the contract should be awarded. (**Raunaq International Ltd.**¹⁹; **Air India Ltd**²⁰). In a commercial transaction of a complex nature what may appear to be better, on the face of it, may not be considered so when an overall view is taken. In such matters the Court cannot substitute its decision for the decision of the party awarding the contract. (**Air India Ltd**²⁰). The Court's interference in such

matters should be minimal and it should, normally, exercise judicial restraint unless illegality or arbitrariness, on the part of the employer, is apparent on the face of the record. (**B.S.N. Joshi**²²).

On a challenge to certain conditions, in the Notice Inviting Tender, the Supreme Court, in **Association of Registration Plates**⁶, held that the State, as the implementing authority, had to ensure that the scheme was effectively implemented; keeping in view the enormous work involved, resort to the 'trial and error' method would prove hazardous; the State's concern, to get the right and most competent person, cannot be questioned; it had to eliminate manufacturers who had developed recently just to enter into the new field; insistence of the State to search for an experienced manufacturer with sound financial and technical capacity could not be misunderstood; the relevant terms and conditions were so formulated as to enable the State to adjudge the capability of a particular tenderer who could provide a fail-safe and sustainable delivery capacity; capacity and capability are the two most relevant criteria for framing suitable conditions of any Notice Inviting Tender; the impugned clauses were incorporated, as essential conditions, to ensure that the manufacturer selected would be technically and financially competent to fulfil the contractual obligations which, looking to the magnitude of the job, required huge investment - qualitatively and quantitatively.

As the prescribed qualification requirements are what are required for execution of the subject work, even if the 4th respondent is the only manufacturer which has the necessary experience and expertise to execute the subject work, it would not

render the stipulated qualification requirements tailor made conditions to suit the 4th respondent. It is only if the conditions stipulated in the tender are wholly irrational and have no reasonable nexus to the work sought to be executed, can such conditions then be said to suffer from the vice of being tailor made conditions. Even if the sub-station experience and the experience of the subsidiary, prescribed as qualification requirements were to be deleted, it is not as if the appellants fulfil all other qualification requirements stipulated in the tender notification. We are satisfied that, on a cumulative reading of all the qualification requirements stipulated in this tender notification, they are such as to ensure that the tenderer has the required experience to execute the subject work. When examined in the light of the work to be executed, the tender conditions cannot be said to be tailor made or a cloak used as an ostensible rational parameter when, in fact, it has been prescribed to exclusively suit respondents 3 to 5. It is for the 2nd respondent to decide upon its requirements, and to specify the tender conditions accordingly. It is only if the tender conditions, as prescribed by the 2nd respondent, have no rational relation to the work sought to be executed, would the appellants then be justified in their claim that the tender conditions are tailor made to suit a pre-identified supplier or a contractor.

In **Bharat Biotech International Ltd**¹, on which reliance is placed on behalf of the appellants, UNICEF had, in the previous year, advised the State Government to procure Hepatitis-B Vaccine from international sources for two reasons; the first was that none of the local manufacturers had 'WHO pre-qualification', secondly, the difference in the price, offered by the three domestic

manufacturers, was only about one American cent which, in turn, was substantially higher than the equivalent off-shore landed price; and, for the said reasons, both UNICEF and the State Government had thought it better to procure the vaccine in question from foreign sources. In the next year, when the State Government wanted to procure the Vaccine, it started enquiries to find out whether there were any WHO pre-qualified manufacturers within the country. By the date, a decision was taken to call for tenders from primary manufacturers in India having WHO pre-qualification, the State Government was aware that there was only one manufacturer in India who had acquired the WHO pre-qualification; and, though the respondents were in regular correspondence, still the State Government went ahead with the process of calling for tenders stipulating the condition that the tenderer should be a primary manufacturer in India with WHO pre-qualification. It is in this context that a Learned Single Judge of this Court observed:-

“.....It may be open for the State to prescribe such rational conditions as it thinks fit in the matter of entering into a contract for procurement of commodities. In my view the rationality of the decision, cannot be decided only on the basis of the prescription of the standard of quality of the commodity sought to be procured. It is already noticed that for the earlier year, the State had more than one criteria for identifying sources from which vaccine is to be procured. **Undoubtly one of them is quality of the commodity, but the second and equally important is the cost of procurement.** As already noticed from Paragraph 12 of the counter, the State was advised by the UNICEF to go for procurement from the international market for the reason that it not only ensured the quality of the material, but also worked out cheaper.

However, when it came to the present year, the State does not appear to have considered the question whether procurement from the domestic market would be cost effective. A factor which was considered relevant for the previous year. For the reasons best known to the State, the State ignored that consideration. The counter of the State is silent in this regard. Yet the State seeks to justify the impugned stipulation in the tender notification to be a rational one and beyond the reach of the Court's scrutiny.

The only reference with regard to the cost effectiveness of the procurement in the domestic market is to be found at the Paragraph 13 of the counter, which reads as under:

"...Accordingly, APHMHIDC was addressed, vide letters dated 11-10-2002 and 21-10-2002 to procure from National manufacturers with WHO pre-qualifications at a cost less than last year's procurement price from UNICEF APHMHIDC invited tenders for supply of Hepatitis-B Vaccine from primary manufacturers in India with WHO pre-qualification only..."

In the background of the above, it becomes very difficult to understand as to why the State decided to call for tenders from the primary manufacturer in India with WHO pre-qualifications. The State had definite information that only one such manufacturer exists. When State decided to procure vaccine at a price less than the cost of the imported vaccine only from the domestic manufacturers with WHO pre-qualification, the State could have straightaway negotiated with the third respondent after actually ascertaining the actual current cost of the imported vaccine. However the State did not choose to take such course of action. For some mysterious reasons, the State chose to call for tenders with the impugned condition. Therefore the allegation of the petitioner that the impugned condition is tailor-made to suit only one person, i.e., third respondent is to be accepted.

Nothing further is brought to the notice of this Court in this regard whether any assessment was made to find out the difference between the current cost of the imported vaccine vis-a-vis the vaccine manufactured in India. On the other hand, I am informed at the time of hearing that when the tenders are opened there is a price variation of almost 100% between the petitioner who participated in the process pursuant to the interim order in this writ petition and the third respondent, the price offered by the third respondent being higher. A premium which the third respondent obviously demands for being the only manufacturer in this country who satisfied the conditions stipulated in the tender notification.....

.....But, in view of my conclusion that the legality of prescribing the condition of WHO pre-qualification cannot be decided in the present case, I shall assume for the sake of argument, that the belief of the State that a WHO pre-qualified manufacturer's product would be of a higher standard is justified, still the State will have to explain the reasons which prompted the State to call for tenders only from the domestic manufacturers with WHO pre-qualification. For by making such a stipulation the State obviously overlooked the cost factor which even according to the State was a relevant factor in the previous year. No explanation is forthcoming from the State, to justify the stipulation to procure the material from only a domestic manufacturer with such pre-qualification. Therefore I find it difficult to accept the submission of the State that the impugned stipulation is inherently a rationale stipulation.

No assessment of the current price of the commodity manufactured by the WHO pre-qualified manufacturer in the international market is demonstrated to have been made.

For the abovementioned reasons, I am of the opinion that the impugned stipulation insofar as it invites tenders only from domestic manufacturers is arbitrary. The Writ Petition is therefore allowed to that limited extent." (emphasis supplied).

In Bharat Biotech International Ltd¹, though there were manufacturers abroad, with WHO pre-qualification, from whom such vaccines could also have been procured, the tender restricted submission of bids only by primary manufacturers in India with WHO pre-qualification. There was only one manufacturer in India

with WHO pre-qualification, and this fact was known to the State Government. As compared to the off-shore price of the vaccine available abroad, the price quoted by the sole Indian manufacturer, with WHO pre-qualification, was much higher. It is in this context that a Learned Single Judge of this Court observed that, while one of the criteria for identifying sources from which the vaccine should be procured was the quality of the product, an equally important criteria was its cost; and, as there was a huge variation in price, the premium which the Indian manufacturer demanded, for being the only manufacturer in the country which satisfied the conditions stipulated in the tender notification, was extremely high.

Unlike in **Bharat Biotech International Ltd**¹, in the present case, the 2nd respondent invited global tenders, which means that not only manufacturers in India, but also those abroad were entitled to participate in the tender process. It is not even the appellants case that the other manufacturer which fulfilled the stipulated qualification requirement of experience, had quoted a lower price, than the successful tenderer, in undertaking execution of the subject work. As the cost of execution of the work is not in issue in the present case, it is only if the prescribed qualification requirement is held not to have a rational relation to the work sought to be executed, can it then be held that the prescribed qualification requirements are tailor made. As we are satisfied that there is a rational nexus between the prescribed qualification requirement and the tendered work sought to be executed, reliance placed on behalf of the appellants on **Bharat Biotech International Ltd**¹ is wholly misplaced.

The contention, urged on behalf of the appellants under this head, can be examined from another angle also. The tender conditions permitted a joint-venture of two companies/persons to submit a joint bid. In the present case the joint bid, submitted by respondents 4 and 5, has been accepted by the 2nd respondent. Neither the appellants nor respondents 6 and 7 have, admittedly, submitted their bid pursuant to the tender notice. It is not even their case, before this Court, that they have the required experience of having manufactured and supplied cables of the prescribed length, size and quality, much less to have the stipulated experience in laying these cables underground. Even if their contention, regarding prescription of sub-station experience and subsidiary experience of merely 2 KM, is presumed not to be without merit, it is not as if they fulfill all the other conditions stipulated in the tender notification, or to possess the experience required to execute a work of this magnitude or complexity. As is evident from the letter addressed by them, to the Chief Engineer-Construction of the 2nd respondent, on 25.05.2017, it is only if the work is split into four different lots would they, on their own showing, fulfill the technical eligibility criteria of manufacturing and supplying the reduced quantity of cables.

We may not be understood to have held that the appellants would have fulfilled the eligibility criteria even if the tender conditions had been so revised, for it is only if they had participated in the tender process could their self-serving claim, of possessing the reduced experience, have been examined by the tender evaluating authority.

Should the tendered work be interdicted at the behest of a person or a company which, admittedly, does not have the prescribed experience (as stipulated as the qualification requirement in the tender notification) to execute a work of this complexity and magnitude? It must be borne in mind that the jurisdiction which this Court exercises is in larger public interest and, even if a technical flaw is detected, interference would be justified only if this Court is satisfied that larger public interest would be served thereby. On a challenge to the award of a contract, or invitation to tender, by a public authority or the State, this Court must be satisfied that there is some element of public interest involved in entertaining such a petition. The elements of public interest are (1) public money would be expended for the purposes of the contract; (2) the goods or services which are being commissioned are for a public purpose; (3) the public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously; and (4) the public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. (**Raunaq International Ltd**¹⁹). The Writ Court would not be justified in interfering with commercial transactions in which the State or its instrumentalities are parties except where substantial public interest is involved. (**Raunaq International Limited**¹⁹; **Tejas Constructions & Infrastructure (P) Ltd.**²⁹). The “duty to act fairly”, a part of the fair procedure envisaged under Article 14, requires every activity of the public authority, or those under public duty, to be received and guided by public interest. (**Union of**

India v. Mohan Lal Capoor⁸⁹; **Mahesh Chandra v. U.P. Financial Corpn.**⁹⁰; **LIC v. Consumer Education and Research Centre**⁹¹).

Save substantial public interest being adversely affected, or the transaction being vitiated by malafides, this Court would not in the exercise of its jurisdiction under Article 226 of the Constitution of India, ordinarily, interfere in matters in the contractual domain. Only when it comes to the conclusion that overwhelming public interest requires interference, would it intervene. (**Air India Ltd**²⁰).

It is submitted, on behalf of the 2nd respondent, that AP Transco had invited the present tender, at the request of the Capital Region Development Authority (CRDA), and the work notified is in connection with the construction of the capital complex buildings of the State of Andhra Pradesh at Amaravathi; and there is utmost urgency in completion of the work, notified under the impugned Tender Notice, within the stipulated time in public interest.

The purpose of judicial review is to check whether the choice or decision is made 'lawfully', and not to check whether the choice or decision is 'sound'. Attempts by persons 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 to persuade courts to interfere by exercising the power of judicial review, should be resisted. (**B.S.N. Joshi**²²). Such interference, 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. (**Jagdish**

⁸⁹ (1973) 2 SCC 836

⁹⁰ (1993) 2 SCC 279

⁹¹ (1995) 5 SCC 482

Mandal⁵). Setting aside the subject tender notification, at the behest of the appellants herein, would, undoubtedly, not serve larger public interest as it would needlessly delay completion of the work, and result in further increase in the cost of its execution.

It would be wholly inappropriate, therefore, for this Court to interfere with the qualification requirements prescribed by the 2nd respondent, that too at the behest of the appellants who, even if the tender conditions of sub-station experience and the requirement of a subsidiary having merely 2 KMs experience, were to be deleted, would still not fulfill the other qualification requirements stipulated in the tender notification. We see no reason, therefore, to interdict the tender notification at the behest of the appellants who, admittedly, do not fulfill the main eligibility criteria of having manufactured and supplied 1000 sq. mm 220 KV copper conductor cables of a length of 245 KMs, and of laying underground cables of such quality, size and length.

X. OTHER CONTENTIONS:

It is contended, on behalf of the respondents, that, originally, the appellants herein, along with Respondents 6 and 7 herein, had filed W.P.No.33695 of 2017 challenging the tender notice; the present Writ Appeal is preferred by the 1st and 2nd Petitioners in the Writ Petition only; the 3rd and 4th Petitioners in the Writ Petition have backed out; it is not spelt out, in the writ affidavit, whether Appellant No. 1 and Writ Petitioner No. 3 had any form of association, or whether they had joined together only in an alleged common cause; the Writ Petition was filed to further the oblique motive of the appellants to have the tender split into several parts; this was sought to be achieved by a devious process of making

frivolous allegations against Respondent No.3 though it is not even a member of the consortium; and its inclusion in the array of parties is purely with a view to make a mountain of an imaginary scenario.

When the appellants challenge, to the qualification requirements in the tender notification, is examined in the light of their letter to the 2nd respondent dated 25.05.2017, the submission, made on behalf of the respondents, that the appellants intention in filing the Writ Petition was only to have the subject work divided into several lots, which may then make them eligible to participate, cannot be said to be without merit. We, however, see no reason to dwell on this aspect, as the challenge to the order of the Learned Single Judge must, for other reasons stated hereinabove, fail.

XI. CONCLUSION:

In view of the aforesaid reasons, the Writ Appeal fails and is, accordingly, dismissed. However, in the circumstances, without costs. Miscellaneous Petitions, if any pending, shall also stand dismissed.

(RAMESH RANGANATHAN, ACJ)

(KONGARA VIJAYA LAKSHMI, J)

Date: 04-06-2018.

Note: L.R. copy to be marked.
B/o
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