

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.Nos.43663 of 2017 & 1593 of 2018

COMMON ORDER:

Since the issues that arise for consideration in these two writ petitions are broadly similar, with slight variations, this Court deems it appropriate to dispose of these two writ petitions by way of this common order.

2. In these two writ petitions challenge is to the action of the Chief Administrative Officer (Const.) SCR, Nirman Bhavan, Secunderabad in rejecting the bids of the petitioners herein.

3. In W.P.No.43663 of 2017, petitioner is a conglomeration of three Partnership Firms, namely, M/s C.Suresh Reddy & Co., M/s C.S.R. Constructions and M/s Laxven Systems, formed for the sole purpose of participating in response to the e-Tender Notice No.31-CAO/C/SC/2017-Item 2 dated 1.9.2017.

4. In W.P.No.1593 of 2018, petitioner is Joint Venture of two Private Limited Companies i.e. M/s Deepika Infratech Pvt. Ltd., and M/s Hyderabad Towers and Displays Pvt. Ltd. The said Joint Venture was formed vide a Memorandum of Understanding for the sole purpose of participating in the e-Tender Notice No.31-CAO/C/SC/2017-Item 2 dated 1.9.2017.

5. The Chief Administrative Officer-3rd respondent herein floated two tenders, inviting bids from eligible contractors. First one being Tender No.31-CAO-C-SC-2017/ITEM 1 for the work relating to doubling of track

between Guntur-Guntakal Section, Earthwork information including blanketing to GE.0014 specifications, construction of minor bridges, RUBs for LCs and other miscellaneous works from KM 401.47 to KM 352.600 i.e. between Guntakal (incl) and Linganenidoddi (excl) Stations-Reach III. The second Tender No.31-CAO-C-SC-2017-ITEM 2 for the work relating to doubling of track between Guntur-Guntakal section, Earthwork information including blanketing to GE.0014 specifications, construction of minor bridges, RUBs for LCs and other miscellaneous works from KM 352.600 to KM 297.000 i.e. between Linganenidoddi and Betamcherla stations which is called Reach IV.

6. In these two writ petitions, the controversy is with regard to Item No.2 only. The petitioner in W.P.No.1593 of 2018 emerged as successful bidder in respect of Item No.1. Petitioners in these two writ petitions submitted their tenders for Item No.2. The respondent authorities rejected the bids of the petitioners for Item No.2. In W.P.No.1593 of 2018, the Respondents disqualified the bid on the ground that the petitioner failed to upload the MOA of one JV Partner. In W.P.No.43663 of 2017, the Respondents disqualified the bid of the petitioner on the ground that the petitioner did not upload the 26AS of M/s C.Suresh Reddy & Co. as per paragraph 5 of the Tender Notice.

7. Heard Sri P.Sri Raghuram, learned Senior Counsel, representing Sri P.Sriram, learned counsel for the petitioner in W.P.No1593 of 2018 and Sri Vemulapalli Prasada Rao, learned counsel for the petitioner in W.P.No.43663 of 2017, Sri Rajeev Reddy, Sri P.Bhaskar and Sri Peri Prabahkar, learned Standing Counsel for Railways and Sri J.Srinadh

Reddy, learned counsel appearing for unofficial respondent and perused the material available on record.

8. Submissions/contentions of Sri P.Sri Raghuram, learned Senior Counsel

(1) The action impugned is highly illegal, arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.

(2) The petitioner Joint Venture is fully qualified and did fulfil all the requisite criteria for consideration.

(3) Due to an unfortunate mistake in respect of Item No.2 work, while uploading the requisite documents, MOA of JV Partner HTDPL, the AoA was uploaded twice instead of once and consequently the MoA was not uploaded as required and that the said inadvertent mistake was not within the knowledge of the petitioner herein at that point of time.

(4) There is absolutely no justification on the part of the Respondents in disqualifying the bid of the petitioner for Item No.2, as the subject document was already uploaded for Item No.1 and was available with the Respondents.

(5) The production of the said document is only an ancillary in nature and is not a mandatory document, as such, the Respondents grossly erred in rejecting the bid of the petitioner herein.

(6) The rejection of the bid of the petitioner is opposed to public interest.

To bolster his submissions/contentions, the learned Senior Counsel places reliance on the following judgments:

- (a) Karnail Singh v.State of Punjab and another¹
- (b) G.J.Fernandez v. State of Karnataka and others²

¹ AIR 1996 SC 85 & 203

9. Submissions/contentions of Sri Vemulapalli Prasada Rao

- (1) The impugned action is highly illegal and arbitrary.
- (2) The alleged infirmity which is the sole basis for disqualification i.e. failure to upload 26AS form is only ancillary in nature and the same is not a mandatory requirement, as such, the Respondents grossly erred in rejecting the tender.
- (3) After opening the technical bid, the Chief Administrative Officer sought clarification on 17.10.2017 from the Chartered Accountant of the petitioner as to the genuineness of the documents uploaded by the petitioner and the Chartered Accountant of the petitioner on 2.11.2017 confirmed the genuineness of the documents and along with the said letter dated 2.11.2017, the Chartered Accountant sent 26AS form i.e. before opening of the financial bid.
- (4) The unofficial respondent offered Rs.115 crores and the petitioner offered Rs.95 crores, as such, on the ground of public interest also, the Respondents ought not to have disqualified the petitioner.

In support of his submissions, the learned counsel places reliance on the judgment in Poddar Steel Corporation v. Ganesh Engineering Works and others³.

10. Submissions/contentions of Sri Rajeev Reddy, learned Standing Counsel for Railways

- (1) There is no illegality nor there exists any infirmity in the impugned action and in the absence of the same, the impugned action is not amenable for any judicial review under Article 226 of the Constitution of India.

² (1990) 2 SCC 488

³ (1991) 3 SCC 273

(2) The conditions of tender which stipulate production of subject documents are mandatory in nature and not optional as submitted by the learned counsel for the petitioners.

(3) The conditions which prescribe production of subject documents along with tender are not in challenge in the writ petitions and no malafides, bias or favouritism are attributed specifically in the pleadings.

(4) As per clauses in the tender notification, non-enclosure of relevant documents automatically results in rejection.

(5) Any interference by this Court with the tender process would violate Article 14 of the Constitution of India, because on seeing clauses in the tender notification, certain people might have not responded and if the said process is interdicted, the same would result in the escalation of cost of construction.

To bolster his submissions, the learned Standing Counsel for Railways takes the support of the following judgments.

- (a) Central Coalfields Limited and another v. SLL-SML (Joint Venture Consortium) and others⁴.
- (b) JSW Infrastructure Limited and another v. Kakinada Seaports Limited and others⁵.
- (c) SAM Built Well Private Limited v. Deepak Builders and others⁶.
- (d) Consortium of Titagarh Firema Adler S.P.A. Titagarh Wagons Ltd. through Authorised Signatory v. Nagpur Metro Rail Corporation Limited and another⁷.
- (e) KRANS-TVSR (Joint Venture), Secunderabad v. South Central Railway, Secunderabad and others⁸.
- (f) State of Jharkhand and others v. CWE-SOMA Consortium⁹.
- (g) Union of India, South Central Railway, Secunderabad and others v. M/ s Laxmi Builders, Secunderabad and another¹⁰.

⁴ (2016) 8 SCC 622

⁵ (2017) 4 SCC 170

⁶ (2018) 2 SCC 176

⁷ (2017) 7 SCC 486

⁸ 2017 (6) ALT 587

⁹ 2016 (6) ALD 185 (SC)

11. Sri Peri Prabhakar, learned Standing Counsel for Railways, appearing in W.P.No.43663 of 2017, while supporting the arguments of Sri Rajeev Reddy, places reliance on the following judgments.

- (a) Glodyne Technoserve Limited v. State of Madhya Pradesh and others¹¹.
- (b) Michigan Rubber (India) Limited v. State of Karnataka and others¹².

12. In the above backdrop, now the issues that emerge for consideration of this Court are;

- (1) Whether the clauses which prescribe production of documents as mentioned above are mandatory or optional and whether the Respondent authorities are justified in disqualifying the bids of the petitioners herein?; and
- (2) Whether the petitioners herein are entitled for any relief under Article 226 of the Constitution of India?

13. In W.P.No.1593 of 2018, as per clause 5 of the tender document which deals with compliance, it is incumbent on the part of the tenderer to enclose a copy of the Memorandum and Articles of Association of the Company. Clause 3.2 of the Commercial Compliance clearly stipulates production of copy of Memorandum and Articles of Association of the company as a mandatory requirement. As per clause 4 of the tender document, the e-Tender shall be rejected if the tender is not accompanied by the copies of the documents in support of Proprietary Concern/Partnership Firm/Private Limited Company/Limited Company/JV Firm/Valid MOU for JV firms as detailed in Commercial Compliance. Admittedly, in this case, petitioner did not enclose copy of the

¹⁰ 2003(3) ALT 1 (DB)

¹¹ (2011) 5 SCC 103

¹² (2012) 8 SCC 216

Memorandum and Articles of Association of the company which is a mandatory requirement.

14. In W.P.No.43663 of 2017, clause 4 of the tender conditions, which deals with eligibility conditions, mandates uploading of provisional balance sheets issued by the Chartered Accountant, clearly indicating the contractual receipts and supported by Income Tax Form-26AS. In the instant case, admittedly, along with tender, petitioner herein did not upload 26AS document. The justification sought to be offered by the petitioner in this writ petition is that when the Chief Administrative Officer sought clarification on 17.10.2017 from the Chartered Accountant as to the genuineness of the documents uploaded, the Chartered Accountant on 2.11.2017 while confirming the genuineness of the documents has sent form 26AS before opening the financial bid.

15. The conditions of the tender document, as narrated supra, in clear and unequivocal terms, demonstrate that uploading of the subject documents along with tender is a mandatory requirement. It is also required to be noted that the tender conditions further stipulate that in the event of non-enclosure of the said documents, tenders are liable to be rejected. According to the learned counsel for the petitioners, the above requirements are only optional, but not mandatory, as such the rejection of the bids is arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India.

16. In order to appreciate the rival contentions of the learned Advocates, it may be appropriate to refer to the judgments cited.

(1) In *Karnail Singh v. State of Punjab* (1 supra), the Hon'ble Supreme Court at paragraphs 85 and 203 held as under:

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

203. The alternate submission is the question of even clerical error does not arise here because one month before acceptance Hutchison Max had sent the compliance form. Where the matter is purely technical the court should not exercise the power of judicial review. We find great force in this submission. We are clearly of the opinion that the mistake is in relation to a non-essential matter that is in relation to peripheral or collateral matter. There has been every intention to comply with the terms of the bid. For an accidental omission it cannot be punished. We concur with the High Court”.

The said judgment rendered by the Hon'ble Apex Court would not render any assistance to the case of the petitioners herein as the conditions stipulate the production of documents are mandatory in nature.

(2) In *Poddar Steel Corporation v. Ganesh Engineering Works* (3 supra), the Hon'ble Supreme Court at paragraphs 3, 6, 7 and 8 held as under:

“3. The case of the appellant has been that its tender mentioned the highest amount of one and a half crores rupees for the 2000 M.T. of Ferrous Scrap which was a very fair price, and the authorities were absolutely right in accepting the same. With respect to the alleged deficiency in the matter of deposit of the earnest amount, the stand is that a Banker's Cheque is as good as cash and especially so when a verification from the bank in question about its authenticity was made and the Bank's assurance to honour the same was obtained. Admittedly, the Tender Committee had taken the precaution of getting the matter confirmed from the appellant's bank before deciding to accept his tender.

6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the Clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in *GJ Fernandez v. State of Karnataka and Ors.* [1990]1SCR229 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*: (1979)1ILLJ217SC but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely

examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.

7. The nature of payment by a certified cheque was considered by this Court in *Sita Ram Jhunjhunwala v. Bombay Bullion Association Ltd. and Anr.* [1965] 35 Comp Cas 526. Several objections were taken there in support of the plea that the necessary condition in regard to payment was not satisfied and in that context this Court quoted the observations from the judgment in an English decision (vide *Spargo's case*: 1873 L.R. 8 Ch. App. 407) that it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards. This Court applied that the observations to a transaction requiring payment by one to another. The High Court's decisions in *B.D. Yadav's case* and *T.V. Subhadra Amma's case* are also illustrations where literal compliance of every term of the tender notice was not insisted upon.

8. In the instant case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of Clause 6, specially when it was in its interest of not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of the respondent No. 1 filed before the High Court. The appeal is accordingly allowed with costs through out."

In the considered opinion of this Court, the above said judgment also would not be helpful to the case of the petitioners herein.

17. Coming to the judgments cited by the learned Standing Counsel for Railways:

(1) In *Central Coalfields Limited and another v. SLL-SML (Joint Venture Consortium)* (4 supra), the Hon'ble Supreme Court at paragraphs 27 to 48 held as under:

"27. What is extraordinary about this case is that the employer, that is CCL, seeks to adhere to the terms of the NIT and the GTC issued by it, but the submission of JVC is that CCL should actually deviate from the terms of these documents so as to benefit JVC. Indeed, in spite of a specific requirement that the bank guarantee should be submitted in the prescribed format, JVC claims an entitlement to a deviation in this regard on the ground that the prescribed format was a non-essential term of the NIT and the GTC. Who is to decide this issue of essentiality? Does CCL with whom the contract has to be entered into by the successful bidder have no say in the matter? Before adverting to this, it is necessary to get clarity on some circumstances.

28. The first and the foremost aspect of the case that must be appreciated is that, as mentioned above, JVC was certainly not computer illiterate. Like every bidder, it was required to have a Digital Signature Certificate which clearly indicates that any bidder (including JVC) had some degree of comfort with e-tenders and the use of computers for bidding in an e-tender. It is this familiarity that enabled JVC to access the "incorrect" format of a bank guarantee. Under these circumstances, it is extremely odd that JVC was not able to access the correct and prescribed format of the bank guarantee. The excuse given by JVC that the NIT was vague and that it was not clear which was the prescribed format of the bank guarantee appears to be nothing but a bogey. A simple reading of the GTC and the terms of the bank guarantee would have been enough to indicate the correct prescribed format and the "incorrect" format.

29. Secondly, the heading mentioned in both the GTCs was different. The correct GTC bore the heading "Governing Hiring of Equipment for removal of Overburden, Extraction of Coal, Transportation and loading in Areas of Central Coalfields Limited" while the not relevant GTC bore the heading "Governing Contractual Transportation &

Loading in Areas of Central Coalfields Limited". There is a substantial difference between the two GTCs and anyone bidding for the work "Out sourcing for Overburden Removal (1050.00 L. CuM) and Coal Extraction (975.00 L. Te) and transportation by deploying surface miner at Ashok OCP, Piparwar Area for a period of 8 years" could immediately see which GTC is relevant and which is not.

30. In this context and thirdly, it is important to note that if JVC had any doubt with regard to the format of the bank guarantee to be furnished, it could have and ought to have sought a clarification from the concerned authority as mentioned in the NIT. Moreover, JVC could have and ought to have at least made a representation to CCL that the prescribed format for the bank guarantee was either not available or that the NIT was ambiguous or that it lacked clarity with regard to the prescribed format of the bank guarantee. JVC neither sought any clarification nor did it make any representation to CCL. It is difficult to understand the conduct of JVC in the situation presented before us, particularly with reference to a contract for about Rs. 2000 crores for eight years.

31. We were informed by the learned Attorney General that 9 of the 11 bidders furnished a bank guarantee in the prescribed and correct format. Under these circumstances, even after stretching our credulity, it is extremely difficult to understand why JVC was unable to access the prescribed format for the bank guarantee or furnish a bank guarantee in the prescribed format when every other bidder could do so or why it could not seek a clarification or why it could not represent against any perceived ambiguity. The objection and the conduct of JVC regarding the prescribed format of the bank guarantee or a supposed ambiguity in the NIT does not appear to be fully above board.

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

33. In *Ramana Dayaram Shetty v. International Airport Authority of India* MANU/SC/0048/1979 : (1979) 3 SCC 489 this Court held that

the words used in a document are not superfluous or redundant but must be given some meaning and weightage:

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

34. In Ramana Dayaram Shetty's case, the expression "registered IInd Class hotelier" was recognized as being inapt and perhaps ungrammatical; nevertheless common sense was not offended in describing a person running a registered II grade hotel as a registered II Class hotelier. Despite this construction in its favour, Respondents 4 in that case were held to be factually ineligible to participate in the bidding process.

35. It was further held that if others (such as the Appellant in that case) were aware that non-fulfillment of the eligibility condition of being a registered II Class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondents 4. This resulted in unequal treatment in favour of Respondents 4-treatment that was constitutionally impermissible. Expounding on this, it was held:

It is indeed unthinkable that in a democracy governed by the Rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the Rule of law and its bare minimal requirement. And to the application of this principle it makes no

difference whether the exercise of the power involves affectation of some right or denial of some privilege.

36. Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of the NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by re-arranging the goalposts, they were denied the "privilege" of participation.

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

38. In *G.J. Fernandez v. State of Karnataka*: (1990) 2 SCC 488 both the principles laid down in *Ramana Dayaram Shetty* were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable." Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in the *Ramana Dayaram Shetty* sense.

39. *Poddar Steel* was a rather interesting case and added a new dimension to the discourse. The decision of the Allahabad High Court records that the relevant Clause in the NIT gave the bidder the option of depositing the earnest money in cash or by a "demand draft drawn on DLW Branch of SBI in favour of Assistant Chief Cashier, DLW/- Varanasi."¹ As many as 21 parties had responded to the NIT, but 8 of them had not deposited any earnest money at all and the remaining 13 bidders had "deposited the earnest money by one

mode or the other but not necessarily in the manner provided in the NIT except perhaps a few." The Tender Committee deviated from the terms of the NIT and considered the bids of these 13 bidders and accepted the bid of Poddar Steel, who had given the earnest money not by cash or a demand draft but by "a loose cheque drawn on its C/D account in the Union Bank of India, Sonarpura, Varanasi." On the issue of discriminatory treatment, the contention of the employer was that since all the 13 bidders who had made the earnest money deposit were treated equally, there was no issue of any discriminatory treatment.

40. However, the High Court took the view, following Ramana Dayaram Shetty and the privilege-of-participation principle, that it was possible that if those who did not deposit any earnest money had known that a crossed cheque (drawn on a bank other than SBI) towards earnest money was acceptable to the employer, they too could have been in the fray. Under these circumstances, the High Court held that excluding them from competition, through this unannounced deviation affecting bidders and potential bidders alike, rendered the bidding process unfair. The High Court introduced an "essential term" concept and held that the Clause in the NIT relating to deposit of earnest money was an essential term thereof and could not be deviated from. The Allahabad High Court held:

The mere fact that all the tenderers who had deposited the earnest money, whether in terms of Clause 6 or not had been treated alike cannot make any difference. It is quite possible to visualise that the parties who had failed to deposit the earnest money may also have been in the fray had they known that earnest money through cheque was also acceptable. Thus they have obviously been deprived from competing with others and this makes the action of Respondents 1 to 5 unfair when condition No. 6 of the NIT so specifically points out that deposit of earnest money in any other mode except in cash or by demand draft would not be acceptable. It leads us to think that this was an essential precondition for submitting tenders and the Respondents were not entitled to deviate from this. All tenders which were not accompanied by deposit of earnest money strictly in the manner indicated in the NIT deserved to be rejected. We reject the contention of the Respondents that the earnest money could be accepted even when it was

deposited by some mode other than those in NIT. We also hold that Clause 6 of NIT is not merely ancillary or subordinate condition but in view of the language in which is couched the same was a crucial and essential terms of the tender which could not be deviated from.

41. In appeal, this Court accepted the theory of essential and non-essential or ancillary or subsidiary terms of an NIT. It was held that the cheque of the Union Bank of India issued by Poddar Steel (though a deviation from the terms of the NIT) was sufficient for meeting the conditions of the NIT, the condition being ancillary or subsidiary to the main object to be achieved by the condition and that the employer could waive the "technical literal compliance" of the earnest money Clause of the NIT "specially when it was in its interest not to reject the said bid which was the highest." In other words, this Court concluded that an essential term of the tender document could not be deviated from but an ancillary or subsidiary or non-essential term could be deviated from, and that the deviation could be without any reference to potential bidders.

42. Unfortunately, this Court did not at all advert to the privilege-of-participation principle laid down in Ramana Dayaram Shetty and accepted in G.J. Fernandez. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in Poddar Steel.

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in Tata Cellular v. Union of India MANU/SC/0002/1996 : (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this

Court (following Tata Cellular) in Jagdish Mandal v. State of Orissa: (2007) 14 SCC 517 in the following words:

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

This Court then laid down the questions that ought to be asked in such a situation. It was said:

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

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that

no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference Under Article 226.

44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

45. Rashmi Metaliks was a comparatively different case inasmuch as Clause (j) of the NIT was the subject matter of consideration. This Clause required a bidder to submit "Valid PAN No., VAT No., copy of acknowledgment of latest income tax return and professional tax return." The employer interpreted this to be an essential term for qualifying in the bidding process. This view was upheld by a learned Single Judge and the Division Bench of the Calcutta High Court. This Court reversed in the following words:

We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the Appellant Company and if even thereafter no rectification had been carried out, the position may have been appreciably different.

Essentially therefore, this Court substituted its view for that of the employer who interpreted this term of the NIT to be mandatory for compliance. Rashmi Metaliks followed Poddar Steel and apparently overlooked the dictum laid down in *Ramana Dayaram Shetty, G.J. Fernandez, Tata Cellular and Jagdish Mandal* and must be confined to its own peculiar facts. In any event, this decision does not advance the case of any of the parties before us.

46. It is true that in Poddar Steel and in Rashmi Metaliks a distinction has been drawn by this Court between essential and ancillary and

subsidiary conditions in the bid documents. A similar distinction was adverted to more recently in *Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd.* MANU/SC/0816/2016 : 2016 (7) SCALE 425 through a reference made to *Poddar Steel*. In that case, this Court held a particular term of the NIT as essential (confirming the view of the employer) and also referred to the "admonition" given in *Jagdish Mandal* followed in *Michigan Rubber (India) Limited v. State of Karnataka* MANU/SC/0662/2012 : (2012) 8 SCC 216. Thereafter, this Court rejected the challenge to the employer's decision holding *Bakshi Security and Personnel Services* ineligible to participate in the tender.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* followed in *Michigan Rubber*.

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

(2) In *Consortium of Titagarh Firema Adler S.P.A. Titagarh Wagons Ltd. through Authorised Signatory v. Nagpur Metro Rail Corporation Limited*

(7 supra), the Hon'ble Supreme Court at paragraphs 29, 30, 31 and 38 held as under:

"29. What is urged before this Court is that the Respondent No. 2 could not have been regarded as a single entity and, in any case, it could not have claimed the experience of its subsidiaries because no consortium or joint venture with its subsidiaries was formed. With regard to relationship of holding and subsidiary companies, we have been commended to the authorities in *Balwant Rai Saluja* (supra) and also the judgment of the Delhi High Court in *Rohde and Schwarz GmbH and Co. K.G.* (supra). The essential submission is that Respondent No. 2 as the owner of the subsidiary companies including their assets and liabilities, cannot claim their experience and there is necessity to apply the principle of "lifting the corporate veil", as has been laid down in *Renusagar Power Co.* (supra) and *Life Insurance Corporation of India v. Escorts Ltd. and Ors.* MANU/SC/0015/1985 : (1986) 1 SCC 264. It is also argued that the Government owned entity cannot be treated differently, for a Government owned entity is distinct from the Government and, for the said purpose, inspiration has been drawn from the authority in *Western Coalfields Limited v. Special Area Development Authority, Korba and Anr.* MANU/SC/0244/1982 : (1982) 1 SCC 125. It has also been urged that when the tender has required a particular thing to be done, it has to be done in that specific manner, for the law envisages that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. For the aforesaid purpose, inspiration has been drawn from the authority in *Central Coalfields Ltd.* (supra) wherein reliance has been placed on *Nazir Ahmad v. King Emperor* MANU/PR/0020/1936 : AIR 1936 PC 253.

30. Before we proceed to deal with the concept of single entity and the discretion used by the 1st Respondent, we intend to deal with role of the Court when the eligibility criteria is required to be scanned and perceived by the Court. In *Montecarlo Ltd.* (supra), the Court referred to *TATA Cellular* (supra) wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the

decision has been taken; the lack of expertise on the part of the court to correct the administrative decision; the conferment of freedom of contract on the Government which recognizes a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be tested by the application of Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. The two-Judge Bench took note of the fact that in Jagdish Mandal (supra) it has been held that, if the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The decisions in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and Anr.: (2005) 6 SCC 138, B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.: (2006) 11 SCC 548 and Michigan Rubber (India) Ltd. (supra) have been referred to. The Court quoted a passage from Afcons Infrastructure Ltd. (supra) wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given. After referring to the said authority, it has been ruled thus:

‘We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be

assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

31. In Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director and Anr. v. CSEPD-Is Consortium, rep. by its Managing Director and Anr. MANU/SC/1312/2016 : 2016 (10) SCALE 69, the Court, after referring to Jagdish Mandal (supra) and taking note of the complex fiscal evaluation and other aspects, held:

36. ... At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder

and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither *ex facie* erroneous nor can we perceive as flawed for being perverse or absurd."

38. As is noticeable, there is material on record that the Respondent No. 2, a Government company, is the owner of the subsidiary companies and subsidiary companies have experience. The 1st Respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the concerned Committee and the financing bank. We are disposed to think that the concept of "Government owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium. In the obtaining fact situation, the interpretation placed by the 1st Respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the 1st Respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court."

(3) In *SAM Built Well Private Limited v. Deepak Builders* (6 supra), the Hon'ble Supreme Court at paragraph 11 held as under:

"11. In *Montecarlo Ltd. v. NTPC Ltd.*, MANU/SC/1313/2016 : (2016) 15 SCC 272 at 288, this Court referred to various judgments, including the judgment in *Afcons Infrastructure Ltd.* (supra), and concluded as follows:

26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are

scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

(4) In *KRANS-TVSR (Joint Venture), Secunderabad v. South Central Railway, Secunderabad* (8 supra), when similar question cropped up, this Court dismissed the writ petition.

(5) In *State of Jharkhand and others v. CWE-SOMA Consortium* (9 supra), the Hon'ble Supreme Court at paragraph 21 held as under:

“21. The right to refuse the lowest or any other tender is always available to the government. In the case in hand, the Respondent has neither pleaded nor established mala fide exercise of power by the Appellant. While so, the decision of tender committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the Appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.”

(6) In *Union of India, South Central Railway, Secunderabad v. M/s Laxmi Builders, Secunderabad* (10 supra), the Division Bench of this Court at paragraphs 18, 21 to 25 held as under:

“18. When a writ petition is filed challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. "If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. Price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded.....

The Court should not substitute its own decision for the decision of an expert evaluation committee". (See *Raunaq International Ltd. v. I.V.R, Construction Ltd.*: AIR1999SC393).

21. The next question that falls for consideration is as to whether the action on the part of the appellants in disqualifying the first respondent herein is a mala fide one?

22. In the affidavit filed in support of the writ petition, it is averred that the action of the appellants herein in disqualifying the first respondent herein "is arbitrary, illegal and contrary to the facts besides being for extraneous reasons". It is further averred that the appellants herein "with mala fide intentions and for extraneous reasons, wantonly and deliberately disqualified the first respondent herein.....".

23. There is no specific averment made in the affidavit attributing any malice as such to any individual authority. None of them are impleaded as eo nomine parties. The allegations levelled are vague and indefinite in terms.

24. The burden of establishing the mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.

25. More than one individual is involved in the decision making process. Nothing is stated in the affidavit filed in support of the writ petition as to which authority acted on extraneous considerations in evaluating the tenders. In such view of the matter, it becomes difficult for us to accept the plea put forth by the first respondent-writ petitioner attributing mala fides. The charge of mala fides cannot be upheld. Test to be applied in a given case may be influenced by the extent to which a decision is supported by the collective wisdom, which evidences the decision."

(7) In *Glodyne Technoserve Limited v. State of Madhya Pradesh* (11 supra), the Hon'ble Supreme Court at paragraphs 46 and 47 held as under:

"46. The above provision obliges a tenderer to produce along with the bid document a copy of the Quality certificate which is valid and active on the date of submission of the bid and it does not enable a bidder to withhold the copy of such Quality Certificate. Where the Quality certificate will be expiring shortly and is due for renewal, the bidder is also obliged to produce the renewed certificate at the time

of signing of the contract. The Appellant claimed to have a valid and active ISO 9001:2000 certificate at the time of submission of the bid, but did not produce a copy of the said certificate along with the bid document.

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

(8) In *Michigan Rubber (India) Limited v. State of Karnataka* (12 supra), the Hon'ble Supreme Court at paragraphs 23 and 24 held as under:

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

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

- (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

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

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and
- (ii) Whether the public interest is affected.

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

(9) In *JSW Infrastructure Limited and another v. Kakinada Seaports Limited* (5 supra), the Hon'ble Supreme Court at paragraph 8 held as under:

"8. We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. A Three Judge Bench of this Court in *Tata Cellular v. Union of India* MANU/SC/0002/1996 : (1994) 6 SCC 651 held that (i) there should be judicial restraint in review of administrative action; (ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process (iii) the court does not usually have the necessary expertise to correct such technical decisions.; (iv) the employer must

have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries.”

18. It is also required to be noted that as per clause 65.15.3 of the Indian Railways Standard General Conditions of Contract issued by the Engineering Department of Indian Railways in 2014, which is placed on record by the learned Standing Counsel for Railways, the production of copy of Memorandum and Articles of Association of the Company is a mandatory requirement apart from the above mentioned conditions in the present tender notification. Though it is stated in the affidavit filed in support of W.P.No.43663 of 2017 that the petitioner herein was eliminated only to award the contract to only leftover bidder for extraneous reasons, in the considered opinion of this Court, is completely bereft of any foundation. The fact remains that the petitioners herein failed in enclosing the documents which are mandatory in nature and obviously the insistence on the production of the said documents is to evaluate the financial capabilities of the tenderers, as such, they are not entitled for any relief from this Court.

19. It is also brought to the notice of this Court during the course of hearing that the Respondent Railway authorities have accepted the bid of unofficial respondent for a sum of Rs.97,23,32,989.15 after negotiations, as such, it cannot be said that the acceptance of the bid of unofficial respondent would have impact on the public exchequer. In the considered opinion of this Court, there is no public interest involved in these two writ petitions. In view of the law laid down in the above referred judgments cited by the learned Standing Counsel for Railways and having regard to the facts and circumstances of the case and as the

petitioners failed to upload the documents at the time of submitting the tender and as the production of the said documents at the time of uploading the tender is mandatory in nature, this Court does not find any merit in these writ petitions.

20. Accordingly, both the writ petitions are dismissed. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:13.3.2018
DA





THE HON'BLE SRI JUSTICE A.V.SESHA SAI



W.P.Nos.43663 of 2017 & 1593 of 2018

13.3.2018

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