

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4681 of 2019

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Larsen and Toubro Ltd. having its registered office at L and T House, Ballard Estate, Fort, Mumbai- 400001, through its Joint General Manager-Marketing, Coal and Construction Projects, Arup Bhattacharya, authorised signatory on behalf of the company, aged about 50 years (Male), son of Late Nirendra Nath Bhattacharya, resident of Vadodara, Gujarat

... .. Petitioner/s

Versus

1. SJVN Thermal (P) Ltd. and Ors having registered office at 169 Patliputra Colony, Patna-800013 (Bihar), India through its Chief Executive Officer, Buxar Thermal Power Project
2. The Chief Executive Officer SJVN Thermal (P) Ltd., 169 Patliputra Colony, Patna-800013 (Bihar), India, Buxar Thermal Power Project
3. Head Contracts SJVN Thermal (P) Ltd. Buxar Thermal Power Project, 2nd floor, Navdurga Complex, Collectariate Road, Ambedkar Chowk, Buxar-802103, Bihar
4. Bharat Heavy Electrical Ltd (BHEL) through the Chairman-cum- Managing Director, BHEL House, Siri Fort, New Delhi- 110049.
5. M/S E- procurement Technologies Limited, B- 704-705, Wall Street II, Opp. Orient Club, Nr. Gujarat College, Ahmedabad- 380006.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Ranjit Kumar, Sr.Adv. Mr. Y.V. Giri, Sr.Adv. Mr. Ankur Saigal, Adv. Mr.Ashish Giri, Adv.
For the Respondent nos.1to3:		Mr. S.B. Upadhayay, Sr.Adv. Mr.Mrigank Mauli, Adv.
For the Respondent no.4	:	Mr. Parag P. Tripathi, Sr.Adv. Mr. P.K. Shahi, Sr.Adv. Mr. Vikas Kumar, Adv. Ms. Priya Singh, Adv. Mr. Srinivasan Ramaswamy, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT

Date : 30 -04-2019

Petitioner is one of the bidders.

2. This writ application is seeking to challenge the decision of the respondent no.1 to 3 (hereinafter referred to as ‘the employer’ or ‘the respondent no.1 Company’) whereby the



respondent no.1 Company has extended the prescribed date and time for submission of bids as mentioned in the Invitation for Bidders (in short 'IFB'). The application goes on to say that if the respondent no.4 could not submit its bids by prescribed time in the IFB read with clause 6.1 of the Instruction to Bidders ('ITB') and the time lapsed, the respondent nos.1 Company could not have extended the time and the extension is nothing but a favour shown to accommodate the respondent no.4. The legality and validity of Amendment No. '24' and Amendment No. '25' as contained in Annexure- '5' and '6' respectively to the writ application have been questioned even before opening of the technical bid.

3. Learned senior counsel for the parties have argued the matter at length and this Court acknowledges their assistance rendered to this Court.

Brief facts of the case

4. The respondent no.1 is a wholly owned subsidiary of SJVN Ltd. which in turn is a joint venture of the Government of India and Government of Himachal Pradesh. The respondent no.1- Company came out with an Invitation for Bid (IFB) No.STPL/BTPP/P&C/EPC-01/2018-878 dated 22.08.2018 for Engineering Procurement and Construction (EPC) Package for Buxar Thermal Power Project (2x660 MW). Initially as per the bid



documents the date fixed for submission/uploading the bid documents was 10.10.2018 at 14.00 Hrs.(2.00 PM). The bid document, the relevant part of which has been brought on record with the supplementary affidavit of the petitioner as Annexure-11, would show that it is contained in seven volumes. Volume-I deals with Conditions of Contract (Commercial and General). Volume-I consists of six Sections. Section I is called Invitation for Bids (IFB), Section II is the Instructions to Bidders (ITB), Section III is the Bid Data Sheet (BDS), Section IV lays down the General Conditions of Contract (GCC), Section V provides Special Conditions of Contract (SCC) and Section VI prescribes the Forms and Procedures (FP).

5. In terms of Clause 6.1 of the ITB, respondent no.1- Company amended the original date of submission of bid on various occasions. It is an admitted position that all those amendments prior to impugned amendments were effected before expiry of the time prescribed in the original bid document as also before expiry of time fixed in the subsequent amendments. It is also an admitted position that so far Annexure- '5' and '6' which are the two amendments under challenge by which the time for submission of bid on 05.03.2019 at 13.00 Hrs. was extended to 17.00 Hrs. (IST) on 05.03.2019 and then the date and time for



submission of the bids were further extended from 05.03.2019 to 08.03.2019 at 13.00 Hrs. (IST). These extensions were done after expiry of prescribed time i.e. 05.03.2019 at 13.00 Hrs.

6. The petitioner had raised its objection to the extension of time after expiry of the last amended time. Annexure-8 series are copies of the letters written by the petitioner to respondent no.1-Company raising its protest on the ground that any extension of time after closure of scheduled bids time violates the tender norms and is against the tender provisions specified in Clause 16.4 of the ITB.

7. It is also on record that pursuant to the extension of time the Bharat Heavy Electrical Limited, a Public Sector Undertaking (respondent no.4) has submitted its bids. The participation of respondent no.4 in the given manner is not acceptable to the petitioner, hence the present writ application.

8. In order to appreciate the rival submissions, this Court, while hearing the writ application on 02.04.2019, thought it just and proper to implead the service provider in the case i.e. M/s E-Procurement Technologies Limited as party respondent no.5. The background in which the respondent no.5 was added and a report was called for would be duly reflected in the order dated 02.04.2019 which I quote hereunder for a ready reference:-



“This Court has benefit of hearing Mr.Amrendra Saran, learned Senior Advocate and Mr. S.B.Upadhyay the another learned Senior Advocate in this case. Mr. P.K.Shahi, the learned Senior Advocate has also addressed this Court and has taken-up certain issues on behalf of respondent no.4.

The matter has been heard at length.

Apart from his contention that the employer in this case, i.e. respondent nos.1 to 3 would have no power to extend the time for submission of bid after expiry of the prescribed time by way of amendment, Mr.Amrendra Saran, learned Senior Advocate representing the petitioner has also submitted to this Court that what has been stated in amendment 24 and amendment 25 as contained in Annexure ‘5’ and ‘6’ respectively to the writ application that the extension is being granted because the bidders were facing some technical issues are not correct and it was only to favour the respondent no.4, this Court thinks it just and proper as also in tune with some of the judicial pronouncements cited at the Bar to find out the correct position with regard to the technical issues prevailing at the relevant time i.e., on 05.03.2019 before 01:00 P.M. which was the time prescribed for uploading the tendered documents.

It is the contention of Mr. Shahi, learned Senior Advocate representing respondent no.4 that in fact the respondent no.4 had registered itself well within the time prescribed in the tender document but was facing certain technical glitches in uploading the documents since 04th March itself which were brought to the notice of the service provider.



This Court has also been informed by Mr. S.B.Upadhyay, learned Senior Advocate representing respondent nos.1 to 3 that in fact on 04th March, 2019 the petitioner had also requested respondent nos.1 to 3 to extend the time for submission of the bid for a period of two weeks because they were unable to upload the documents immediately after noticing the amendment effected on 1st March, 2019. It is also contended on behalf of respondent nos.1 to 3 that infact after extension of time the petitioner had visited at least 11 times on the portal and thereby the petitioner had utilized the opportunity granted to all the intending bidders including the petitioner by virtue of the extension of time for submission of bids. Mr. Upadhyay has also relied upon the Judgments of the Hon'ble Supreme Court reported in (2012) 8 SCC 216 (Paragraph 24), (2000) 2 SCC 617, (2016) 16 SCC 818 and (2014) 3 SCC 760 (Paragraph 8 to 12).

Mr. Sahi, learned Senior counsel, has, at this stage, placed before this Court a Division Judgment of the Hon'ble Delhi High Court in the case of Larsen and Turbo Hydrocarbon Engineering Limited vs. Oil and Natural Gas Corporation Limited and Another to submit that the Judgment would cover the issues raised in the present writ application.

Mr. Amrendra Saran, learned Senior Advocate has with all humility to the submissions made by his learned colleague submits that the petitioner does not admit the submission of Mr. Upadhyay, learned Senior counsel for the respondent nos.1 to 3 regarding the 'visiting' of portal by the petitioner



during extended time because the fact is that at any point of time any of its officer had altered any of the contents of the tendered document. Learned Senior Counsel submits that the word 'visiting' has to be understood in the context in which it has been provided and unless it is found that the petitioner has altered any of the terms and conditions of the tender document it cannot be allowed to be argued that the petitioner has utilized the extension of time for submission of the bid. It is submitted that on the very next day the petitioner had protested the extension of time granted by respondent nos.1 to 3.

In course of argument, various submissions have been made by the learned Senior Counsel for the parties. While, it is the submission of Mr.Saran, learned Senior Counsel that there are possibilities of interfering with the information furnished by the petitioner in its financial bid and the respondents may come to know about the price disclosed in the financial bid, it is the submission of Mr.Upadhyay and Mr.Sahi, learned Senior Advocates at the Bar that the 'E-Portal' is security compliant. Reference has also been made to certain frequently asked questions to show that the documents uploaded on the web-site are in encrypted form and unless those are de-crypted and made in readable form after opening of the technical bid, nobody can read it and come to know about its contents thereof. It is also pointed out that the moment anybody would open the bid document of the petitioner, the system will automatically generate an information which will first go to the petitioner showing that his bid



document has been seen by somebody. There is no such allegation in the writ petition according to learned Senior Advocate for the respondents.

Mr. Saran, learned Senior Advocate has in course of argument relied upon the Judgment of the Hon'ble Bombay High Court in case of G.K. Transport Company vs. Western Coalfield Limited to submit that there was an identical Clause in the bid document in the said case whereunder the employer could have modified the bid document by issuing addenda before the deadline of the submission of the bid but when the employer extended the time after the deadline for submission of bids the Hon'ble Bombay High Court did not approve the same. The learned Senior Counsel has also relied upon the Judgment of the Hon'ble Supreme Court in the case of Maharashtra Housing Development Authority vs. Shapoorji Pallonji & Company Private Limited and Ors. reported in 2018 (3) SCC Page 13 to submit that in the said case the time for submission of bid was extended by the employer which was permitted by the Hon'ble High Court but when the Judgment of the Hon'ble High Court was challenged before the Hon'ble Supreme Court the Hon'ble Supreme Court after obtaining a report from the service provider i.e. NIC found that there was no technical glitch in the system and for that reason the Hon'ble Supreme Court took a view that in absence of any technical glitch in the system if the time was extended by the employer contrary to the terms and conditions of the tender then such extension cannot be approved and



the Judgment of the Hon'ble High Court was set-aside.

After going through the Judgment of the Hon'ble Supreme Court in the case of Maharashtra Housing Development Authority (Supra), this Court is of the considered opinion that in order to take a view on the correctness of the reasons provided in the amendment as contained in Annexure '5' and '6' to the writ application it would be appropriate to call upon the service provider in this case i.e. M/s E-Procurement Technologies Limited, B-704-705, Wall Street II, Opp. Orient Club, Nr. Gujarat College, Ahmedabad-380006 to be added as party respondent no.5 in course of the day.

Let the service provider submit a report to this Court within one week from today as to the prevailing technical conditions on 05.03.2019 before 01:00 P.M. The service provider must inform as to whether the reasons shown by respondent nos. 1 to 3 for extension of time by way of amendment 24 and amendment 25 are based on any such technical glitch found on the portal of the employer provided by the service provider. The report shall be submitted in a sealed cover.

Mr. Saran, learned Senior Advocate submits that any report submitted by the service provider be kept open to such submissions which may be made by the parties.

This Court leaves it open for the parties to take all such pleas which may be available to them in respect of the report submitted by the service provider. Mr. Saran has also submitted that even if



the report supports the reasons shown in Annexure '5' and '6' the submission of the petitioner remains that in no case the employer could have extended the time for submission of the bid.

Further submission of the parties shall be heard on next date.

Let a certified copy of this order be served upon the service provider by respondent nos.1 to 3 by day after tomorrow.

The Registry shall issue "Dasti Notice" to respondent no.5 requisites for which shall be filed by the learned counsel for the respondent nos.1 to 3 by tomorrow and the "Dasti Notice" shall be made available to the learned Advocate representing the respondent nos. 1 to 3, his junior colleague or the registered clerk by tomorrow evening.

As prayed, list this case under the same heading on 15th April, 2019 at the top."

9. Pursuant to the aforesaid order, the respondent no.5 sent a report enclosed with their affidavit, but then because nobody was appearing on behalf of the respondent no.5, this Court passed order dated 15.04.2019 directing the respondent no.5 to send a competent officer to explain the matter in course of hearing. Pursuant to the said order one Mr. Tejas Parikh who is also deponent of the affidavit of respondent no.5 and is a senior manager in the company appeared and assisted this Court in understanding some of the technical issues.



Submissions on behalf of the petitioner

10. Mr. Ranjit Kumar, learned senior counsel representing the petitioner has went on elaborating the submissions earlier made by Mr. Amrendra Sharan learned senior counsel. Mr. Kumar has emphatically submitted that the respondent no.1-Company could not have extended the deadline for submission of the bids.

11. Learned senior counsel has put emphasis on the words 'extension' and 'deadline'. It is his submission that the word 'extension' presupposes existence of something. In this case since the prescribed time of 13.00 Hrs. on 05.03.2019 had expired and the deadline was crossed, thereafter the employer i.e. the respondent no.1-Company could not have extended the time by issuing Amendment '24' dated 05.03.2019 at 13.54.33 Hrs. and the subsequent amendment extending the date and time to 08.03.2019 at 13.00 Hrs. (IST). According to learned senior counsel it would amount to committing violence with the terms and conditions of the tender document and shall take away the sanctity of tender. He has heavily relied upon the conditions prescribed in the IFB under clause 4.0, one of which is prescribing the time and date for opening of Techno-commercial Bids. Relying upon a judgment of the Hon'ble Supreme Court in the case of **Provash Chandra**



Dalui and another Vs. Biswanath Banerjee reported in (1989)

1 SCC 487 it is submitted that in the said case the Hon'ble Supreme Court had considered and held that the word 'extension' means to enlarge, expand, lengthen, prolong, to carry out further than its original limit. Thus, extension ordinarily implies the continued existence of something to be extended.

12. He has referred Clause 4.2.1 of the IFB which prescribes the registration for E-tendering and method of applying. Learned senior counsel has pointed out from the relevant conditions under the heading Contact Details that the vendors were given the name and mobile number of the officials who could have been contacted in case of any assistance required with respect to accessing of e-Tendering portal and bid submission, but at the same time there was also a clear caution provided in the IFB saying that all the bidders should get themselves registered well in advance and no extra time will be considered for the delay in online vendor registration. The conditions further prescribe that in case the bidders wait till the last moment for registration/uploading of bids, and if any technical problem is encountered at that time and the closing time may elapse, respondent no.1-Company shall not be responsible in any manner for such delay and any other reason thereof.



13. Learned senior counsel has further pointed out from IFB (running page 92 of the brief) that the respondent no.1-Company may modify/amend the tender document and extend the last date of submission/opening of the bid at any time before the submission of the bids. It is thus his submission that after expiry of the time at 13.00 Hrs. the impugned amendments could not have been brought.

14. Thereafter, learned senior counsel has taken this Court through the various clauses of the ITB. It is submitted that Clause 5.1 which prescribes the manner in which a prospective bidder may look for a clarification to the bidding documents, is to be read with Clause 6 of the ITB. Clauses 6.1, 6.2 and 6.3, according to learned senior counsel for the petitioner are prescribing procedures in the matter of issuance of any addendum/amendment and communication thereof through the portal of respondent no.1-Company and the service provider for viewing by the bidders. Under Clause 6.2 the bidders were advised to regularly check e-tender portal regarding posting of amendments if any. Much emphasis has been given on Clause 6.3 and 16 of the ITB. It is submitted that Clause 6.3 is to read with Clause 16 with special emphasis that Clause 16.0 has its heading “Deadline for Submission of Bids”. Learned senior counsel



submits that Clause 16.2 talks of extension of deadline for submission of bids by amending the bidding documents in accordance with ITB Sub-Clause 6.3, meaning thereby that the deadline for submission of the bids could be extended only when an amendment is brought any time prior to the deadline for submission of the bids. Reference has also been made to Clause 16.4 of the ITB to submit that Clause 16.4 clearly prohibits online submission of bid after expiry of submission time and in such a case the uploaded online bid on the portal shall be considered as non-responsive and shall not be processed further.

15. It is further submitted that according to Clause 16.1 of ITB Techno-Commercial bids must be submitted online no later than the time and date stated in the Bid Data Sheets. It is not in dispute that in terms of the tender conditions, in case of any conflict between the conditions prescribed in the ITB and the Bid Data Sheet, it is the Bid Data Sheets which is to be given effect to. Learned senior counsel thus submits that when the submission is that when the bids column in the Bid Data Sheets (BDS) clearly provides the deadline for bid submission date and time as stated in the IFB, there cannot be any argument that the date and time prescribed in the 'IFB' may be changed after expiry of time.



16. Learned senior counsel has argued that the sanctity of the tender document is of paramount importance and the same should not be allowed to be tinkered with as has been done in the present with sole intention to help the respondent no.4.

17. Learned senior counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Ramana Dayaram Shetty Vs. International Airport Authority of India and others** reported in **(1979) 3 SCC 489** to submit that every word of a tender document should be given its meaning and the entire tender document has to be read together so that no condition stipulated is rendered otiose.

18. Learned senior counsel has further relied upon a judgment of the Hon'ble Supreme Court in the case of **Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) and another** reported in **(2018) 11 SCC 508** to submit that the principle of business efficacy should be applied while interpreting the relevant clauses of the tender documents. He has also relied upon **G.K. Transport Company Vs. Western Coalfield Ltd. (2014) SCC Online Bom. 1030** and **Maharashtra Housing Development Authority Vs. Shapoorji Pallonji & Co. Pvt. Ltd. (2018) 3 SCC 13 (para 9)=AIR 2018 SC 945** to submit



that the technical glitches in the system of R-4 cannot be a ground to extend the deadline.

19. Learned senior counsel has also relied upon a judgment of the Hon'ble Karnataka High Court in the case of **Mahindra Sanyo Special Steel Private Limited Vs. Union of India and Anr. decided on 15th November, 2018** in which relying upon the judgment of the Hon'ble Supreme Court in the case of **Maharashtra Housing Development Authority (supra)** the Hon'ble Division Bench of the Karnataka High Court held that the propositions laid down by the Hon'ble Supreme Court would cover the said case and since the appellant in the said case had not submitted a valid bid by clicking the "freeze button" at 13.45 hrs on 02.04.2018, no grounds for interference was made out. The Hon'ble Division Bench of the Karnataka High Court took note of the scope of judicial review under Article 226 of the Constitution of India as enumerated in the judgment of the Hon'ble Supreme Court in the case of **Tata Cellular Limited Vs. Union of India (AIR 1996 SC 11)** and **Sterling Computers Vs. M& N Publications Limited and others (AIR 1996 SC 51)**.

20. A number of judgments on the scope of judicial review have been cited which this Court would discuss in the later part of it's judgment.



21. Learned senior counsel further submits that now from the report of the service provider, it is evident that there was no technical glitch on the portal of the respondent no.1-Company before 1.00 PM on 05.03.2019, the technical issues which have been made ground for amendments '24' and '25' is a mere pretext and it was only with intention to help respondent no.4.

22. To buttress his points, learned senior counsel submits that no public interest may be found in the impugned action of the respondent no.1 and only because project in question is of worth Rs. 10 thousand crore does not mean that in the name of public interest the respondents may be allowed to play a trick by violating the tender conditions. Learned senior counsel has gone on to argue that it may be a case of collusion between the respondent no.1 and the respondent no.4 and that nobody knows what are the reasons behind it.

23. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Maharashtra Housing Development Authority** (supra), learned senior counsel submits that in the said case the Hon'ble Bombay High Court had issued directions in favour of the first respondent giving him a second opportunity to submit his bid accepting the case of the petitioner that he had faced technical glitch in submission of bid one time. The Hon'ble



Supreme Court called for a report from the NIC after framing two issues. The first issue was whether the bid document uploaded by the first respondent can be retrieved or is irretrievably lost. The NIC filed its affidavit in which it was stated that bid documents cannot be retrieved at this time as the bid opening event has already been concluded. The Hon'ble Supreme Court held that the Hon'ble Bombay High Court was not justified in giving second opportunity to the first respondent because the documents are not retrievable and apart from that lack of any timely response of the first respondent when the system had failed to generate an acknowledgment of the bid documents, in absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not a valid bid. It is submitted that this case would cover the case of the petitioner as in this case also the respondent no.5 had failed to upload the bid and they could not press the submission button within time.

24. Learned senior counsel has further argued on the strength of the judgment of the Hon'ble Supreme Court in the case of **Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corporation Ltd. And Ors. reported in (2007) 8 SCC 1** that by the impugned amendments the respondents have altered the level playing field which has caused prejudice to the



petitioner inasmuch as the petitioner has been made to wait for finalization of tender.

25. Learned senior counsel has also referred the guidelines of the CVC and various paragraphs of the writ application alleging that the petitioner has pleaded malice in law if not in fact. It is submitted that no transparency has been maintained in the matter of extension of time and it is evident from the report of respondent no.5 that there was no technical glitch at the portal of SJVN.

26. Learned senior counsel for the petitioner has also submitted that the sanctity of the tender conditions must be maintained and the negligent approach on the part of the respondent no.4 in not submitting the tender within the time prescribed is liable to be deprecated. He has relied upon a judgment of the Hon'ble Supreme Court in the case of **Sorath Builders Vs. Shreejikrupa Buildcon Limited and Anr. reported in (2009) 11 SCC 9** in which after referring to the earlier judgment of the Hon'ble Supreme Court in the case of **W.B. SEB Vs. Patel Engineering Company Ltd. (2001) 2 SCC 451** their Lordships held that it is equally in public interest to adhere to the rules and conditions subject to which bids are invited.



Submission of Respondent no.1 Company

27. Mr. S.B. Upadhayay, learned senior counsel representing the respondent nos.1 Company submits at the outset that it is nowhere the case of the respondent no.1 Company that there was any technical glitch on its portal. He has taken this Court through Annexure- '5' and '6' to the writ application to submit that in these two Annexures the respondent no.1-Company has only referred to technical issues being faced by the bidders in submission/uploading of bid on SJVN's e-tender Portal. It is submitted that from the report of the respondent no. '5' it is evident that the technical issues were in fact being faced by the respondent no.4, the respondent no.4 had registered itself well in time on 4th March, 2019 itself and had also uploaded all the documents before 13.00 hrs. on 05.03.2019 but when the respondent no.4 did not find the submission button and was facing technical issues, he contacted the respondent no.5 i.e. the service provider and the service provider tried to resolve the difficulties being faced by the respondent no.4. It however could not become possible before 13.00 hrs. therefore, the respondent no.4 contacted the respondent no.1-Company for extension of time. It is submitted that it is also not in dispute that on 04.03.2019 the petitioner had also



submitted a request with the respondent no.1-Company to extend the time for submission of the bids.

28. Learned senior counsel has brought on record Annexure-R-4/5 which is a copy of the request made by the respondent no.4 to respondent no.1-Company at 12.59 PM i.e. one minute before final time for submission of the bid. It is stated in Annexure-R-4/5 that “there was a system problem due to which we are not able to submit bid though we have uploaded all the documents”. At 1.10 PM on 05.03.2019 again a communication was received from respondent no.4 enclosing the upload status report. It was informed that “despite continuous interaction with your ABCPROCURE team for more than a hour prior to closing time of bid submission, bid could not be submitted though it has been fully uploaded”. At 1.54.33 hrs. on 05.03.2019 the extension of time was notified by respondent no.1-Company till 17.00 Hrs (IST) and thereafter at 16.43.03 hrs. (IST) on 05.03.2019 itself the respondent no.4 was able to submit the bid successfully.

29. The respondent no.1-Company has also brought on record a true copy of the log-sheet/event management list appearing on the portal SJVN.ABCPROCURE.COM which shows that the respondent no.4 was successful in final submission of bid on 05.03.2019 at 16.43.03 hrs. (IST).



30. Learned senior counsel submits that the respondent no.1 engaged M/se-Procurement Technologies Ltd. as a service provider for e-tendering and invited online bids on International Competitive Bidding from eligible bidders in single stage two part (i.e. part 1: techno-commercial bid and part 2 price bid) for EPC Package for Buxar Thermal Power Project (2x660 MW) at Chausa. The project is to be completed with an investment of approximately Rs.10,439.0 crore including interest during construction of Rs.1146.50 crore and financing charges of Rs.36.50 crore at January 2018 place level. The project is to be completed within a period of 52 months for first unit of 660 MW. As per the extant instructions of the Ministry of Power and CVC regarding e-tendering the bids were required to be routed through E-Procurement Technologies Ltd., a service provider accredited by the Central Vigilance Commission.

31. It is the submission of Mr. Upadhyay, learned senior counsel that ITB read with BDS empowers, in the given circumstances, the respondent Company to extend the deadline for submission of bids as envisaged in Clause 6.3 and 16.2 of the ITB. He has defended the extension of time vide Amendment '24' and Amendment '25' issued on 05.03.2019 in the given facts and circumstances of the case. It is submitted that the attempt of the



petitioner is to avoid fair competition by larger participation of intending bidders which is one of the requirement of the CVC guidelines.

32. Learned senior counsel submits that the respondent no.1-Company seriously contests the allegations of discrimination or any oblique motive in extending the timeline for submission of the bids. It is submitted that the allegations of there being any oblique motive is totally unfounded and there is no reason to consider the same. Learned senior counsel submits that action of respondent no.1-Company were actuated with bonafide reasons. It is also pointed out that during the extended period of time the petitioner had also revisited its bid on at least 11 occasions, therefore the petitioner had also utilized the extended time to revisit its tender. It is submitted that only because the petitioner did not carry any change in the uploaded tender would not mean that the petitioner had not utilized the extended period for revisiting their tender conditions.

33. Learned senior counsel further submits that there is no requirement in the CVC guidelines that timeline for submission of the bids before the opening time cannot be extended. It is his submission that the respondent no.1-Company has given the level playing field to all the prospective tenderers by notifying the



extension to all the bidders sufficiently in advance in order to enable them to purchase tender document and submit their respective bids. The opportunity was provided to all including the petitioner and it was not confined to one bidder.

34. Learned senior counsel further submits that the petitioner is unable to show that any prejudice has been caused to him only because the time for submission of bid has been extended. As regards the apprehension of the petitioner that the price bid was likely to be seen and known since there was no protective password it is stated in the counter affidavit that there is full proof E-tendering mechanism which makes it impossible to know the particulars of any bid submitted in advance before the date of its opening arrives. In this particular project, according to the respondent no.1-Company, there were two stages of opening the bids, the first was techno-commercial bid and only after the techno-commercial bid is opened, evaluated and after evaluation found responsive, then there is a provision for opening of their price bid. In this regard Clause 19 of the ITB provides for opening and evaluation of the bids. Learned senior counsel has pointed out from clauses 4.4 and 4.5 that the e-procurement system is based on PKI (Public Key Infrastructure) technology for encryption and cyber security. Any interference with the bid already submitted



would be known immediately to both the bidders and the service provider if at all any such incident takes place. In the instant case no such incident takes place and therefore the apprehension has got no basis.

35. Learned senior counsel further submits that even though the amendment '24' and '25' do not mention the word 'public interest', it is always for the Court sitting under Article 226 of the Constitution of India to look into the public interest element present in the decision making process of respondent no.1 Company. Learned senior counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **Air India Ltd.** (supra) to submit that in the matter of award of contract, the Court has limited scope of judicial scrutiny and it is only when the decision making process is found vitiated by malafide, unreasonableness and arbitrariness, the same may be interfered with by way of judicial review. It is submitted that in the case of **Jagdish Mandal v. State of Orissa, reported in (2007) 14 SCC 517** the Hon'ble Supreme Court has laid down the importance of public interest in commercial contracts and held that the government must have a free hand in setting the terms of the tender and it is as a necessary concomitant for administrative body in an administrative sphere.



36. Mr. Upadhayay, learned senior counsel has submitted that the time was extended before opening time of bids without committing any violence to the terms of the tender. Referring to a judgment of the Hon'ble Supreme Court in the case of **Michigan Rubber (India) Limited Vs. State of Karnataka and others** reported in **(2012) 8 SCC 216**, learned senior counsel submits that the learned counsel for the petitioner has not placed paragraph 24 of the judgment wherein the Hon'ble Supreme Court has opined that a court before interfering in tender or contractual matters in exercise of its power under Article 226 of the Constitution of India should pose to itself two questions namely;

(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 that 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?

37. Thus, learned senior counsel submits that it is open to the court exercising power of judicial review under Article 226 of the Constitution of India to consider the issue of public interest before interfering with the decision taken by the employer.



38. Learned senior counsel for the respondent no.1-Company has drawn the attention of this Court towards the facts of the case of **Nabha Power Limited** (supra) and submits that it is only when in the facts of the case five conditions test set out in **B.P. Refinery (Westernport) proprietary Ltd. V. Shire of Hastings 1977 UKPC 13: (1977) 180 CLR 266 (Aus)** are fully satisfied that the implied conditions are to be read in to contract. Learned senior counsel has drawn the attention of this Court towards paragraph 72 of the judgment of the Hon'ble Apex Court in **Nabha Power Ltd.** (supra) to submit that the Hon'ble Apex Court has extended the word of caution by saying that it should certainly not be an endeavour of commercial courts to look to implied terms of contract. Normally a contract should be read as it reads as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test comes into play.

39. Learned senior counsel has tried to distinguish the case of Nabha Power Ltd. Saying that in the said case a dispute with regard to deductions of certain amount from the amount due and payable under the invoices to the appellant led to a cause for the appellant to raise a dispute. In the present case, it is pointed out that till date no contract has been concluded between the petitioner and the respondent no.1-Company and merely by participating in



the tender, the petitioner has not acquired any vested right to challenge the decision of the respondent no.1-Company to extend the deadline for submission of bid. It is submitted that the litigation brought by the petitioner is only against the public interest as it is delaying the decision making process.

40. Learned senior counsel has also relied upon a judgment of the Hon'ble Supreme Court in the case of **Caretel Infotech Ltd. Vs. HPCL and others reported in 2019 SCC Online SC 494**. The attention of this Court has been drawn towards the views of the Hon'ble Supreme Court that the court should not endeavour to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by a party framing the tender.

41. Learned senior counsel submits that the essentiality of a condition in the tender document be left to the wisdom of the employer and it cannot be allowed to be questioned by way of a writ petition. On these grounds, Mr. Upadhayay, learned senior counsel submits that the writ application is fit to be dismissed as no case for interference with the action of the respondent no.1-Company is made out in the facts of the present case.



Submissions on behalf of R-4

42. Mr. Parag P. Tripathi, learned senior counsel representing the respondent no.4 has picked-up from where Mr. S.B. Upadhyay, learned senior counsel left. Learned senior counsel submits that Clause 6.1 and 16 of the ITB are to be interpreted by giving full effect to each and every word contained therein. It is submitted that the ratio of the judgment of **Ramanna Dayaram Shetty** (supra) which has been cited on behalf of the petitioner would rather help respondent no.4. In his submissions a careful reading of the clause 6.1 of the ITB would go long way to show that clause 6.1 envisages a situation where prior to deadline for submission of the bid, the employer may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective bidder, amend the bid documents. Then Clause 6.3, according to learned senior counsel is providing the procedure to be followed once the employer takes decision in terms of clause 6.1 to amend the bidding documents. It is submitted that clause 6.3 has purposely not incorporated the words 'At any time prior to the deadline for submission of Bid' as occurring in clause 6.1. According to him clause 6.3 in the first part talks of a wide discretion on the part of the employer to extend the deadline for submission of bids in accordance with clause 16 and in order to



give a level playing field to all the bidders such extension is to be notified on the portal where all prospective bidders may see the extended time.

43. Learned senior counsel further submits that clause 16.1 Part I (Techno-Commercial) provides that the bids must be submitted online no later than the time and date stated in the Bid Data Sheets. Further clause 16.2 confers wide powers upon the employer to extend the deadline by amending the bid documents in accordance with clause 6.3. Clause 16.2 nowhere restricts the power of the employer in the matter of extension of deadline. There is nothing like clause 6.1. It is submitted that had it been intention of the employer not to provide for any opportunity to extend the deadline for submission of the bids after expiry of the deadline, there was no reason as to why clause 16.2 of the ITB would not prescribe clearly the words 'At any time prior to the deadline'. It is submitted that clause 16.2 confers a discretion on the employer to extend the deadline for submission of the bids by amending the bid documents in accordance with the ITB sub-clause 6.3 and in such case all rights and obligations of employer and bidders will thereafter be subject to the deadline as extended. It is submitted that in clause 6.3 and 16 leave no scope to entertain any doubt that there are no fetters on Employer's discretion to



extend the deadline after expiry of time notified for submission of bid, i.e. 05.03.2019, 13.00 hrs. It is further stand of the R-4 that the petitioner is unnecessarily referring to clause 6.1 which does not deal with question of extension of time for submission of bid, rather it deals with Amendment and Addendum to the bidding documents whereas clause 6.3 and 16 specifically deal with time for submission of bid.

44. Learned senior counsel has further submitted that the emphasis of learned senior counsel representing the petitioner saying that in the counter affidavit the respondent no.1-Company has made a vague statement in paragraph 2.6 that the primary reason for 24th and 25th amendment was the technical glitches/issues being faced by the certain bidders but who were those certain bidders have not been disclosed, has no significance in the context of the present case. It is submitted that the Court sitting under Article 226 of the Constitution of India is not going to be a fact finding court and unless malafide writs large in the decision making process of respondent no.1-Company no interference would be required.

45. Referring to the logs/audit trail report brought on record with the affidavit of respondent no.5 learned senior counsel submits that the affidavit has clearly disclosed that the service



provider was contacted at Shimla location to resolve the intermittent problem faced by the respondent no.4 and that the identified person of the service provider, provided remote access support and tried to resolve the issues faced by the respondent no.4 but could not resolve the issues till 1.00 PM. Learned senior counsel submits that it is evident from the affidavit of respondent no.5 that the bidders were free to contact the service provider for guidance or system requirement or any other service, in this case the petitioner was facing technical glitch and as such well before expiry of deadline, the respondent no.4 had been seeking help of respondent no.5 because after uploading the tender documents the respondent no.4 was unable to find the final submission tab. It is submitted that from the logbook enclosed as Annexure-3 to the affidavit of respondent no.5 it would appear that the respondent no.4 had uploaded its tender documents. The respondent no.5 was giving remote access to the system of respondent no.4 is also evident from the affidavit of respondent no.5 as the respondent no.5 has stated that he tried to resolve the issue but could not resolve till 1.00 PM. It is submitted that the dispute as to where the glitch was located is wholly irrelevant to the dispute and indeed can never be a subject matter of writ jurisdiction. To that extent, learned senior counsel submits that whether the technical glitch



was in the system of respondent no.4 or on the portal of the respondent no.1-Company, the report of the respondent no.5 cannot be taken as a conclusive proof of the fact and if such serious issue of dispute is ventured into for adjudication, the writ court would not be an appropriate forum for the same.

46. Learned senior counsel has relied upon a judgment of the Hon'ble supreme Court in the case of **Central Coalfields Limited and Anr. Vs. SLL-SML reported in (2016) 8 SCC 622**. It is submitted that in the said case the Hon'ble Apex Court reiterated that the 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. It is pointed out that in the said case the CCL being the employer had taken a decision by adhering to the terms and conditions of NIT. The Hon'ble Apex Court while referring to **Poddar Steel Coporation Vs. Ganesh Engineering Works reported in (1991) 3 SCC 273** to advance the theory of essential and non-essential or ancilliary or subsidiary terms of an NIT, held that whether a term of NIT is essential or not is a decision taken by the employer which should be respected. The Hon'ble Apex Court



has further went on to say that 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.

47. Learned senior counsel representing the respondent no.4 submits that in a project of Rs.10000 crore of rupees the entire attempt of the petitioner who is only a tenderer at this stage is to throttle the competition which is otherwise in public interest. Referring to the judgment of the Hon'ble Apex Court in the case of **State of Jharkhand and others Vs. CWE- Soma Consortium reported in (2016) 14 SCC 172** learned senior counsel submits that the Hon'ble Apex Court has held in the said case that in case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. The Hon'ble Apex Court held that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour. Judgment of the Hon'ble Apex Court in the case of **Laxmikant V. Satyawani reported in (1996) 4 SCC 208, Rajasthan Housing Board Vs. G.S. Investments reported in (2007) 1 SCC 477 and U.P. Awas Evam Vikash Parishad Vs. OM Prakash Sharma reported in (2013) 5 SCC 182** have been referred to.



48. Learned senior counsel has further relied upon the recent judgment of Hon'ble Supreme Court in the case of **Caretel Infotech Ltd.** (supra) and observations of the Apex Court in paragraph '38' has been read out.

49. In his attempt to bring home the points canvassed on behalf of the respondent no.4, learned senior counsel has also submitted that so far as the CVC guidelines are concerned, the Division Bench of the Hon'ble Allahabad High Court has in the case of **ABB ABL Limited and others Vs. National Thermal Power Corporation Limited and others** held in paragraph 17 that guidelines issued by the CVC does not have any statutory force. It is submitted that in the case of **Raunaq International Ltd. Vs. IVR Construction Ltd. And others reported in (1999) 1 SCC 492** the Hon'ble Apex Court has reiterated the principles governing the process of judicial review and held that the writ court would not be justified in interfering with the commercial transactions in which the State is one of the parties except where there is substantial public interest involves and in cases where proceeding is malafide.

50. Learned senior counsel has submitted that in **Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651** in paragraph 94 the Hon'ble Supreme Court has emphasized need to



find a right balance between the administrative discretion to decide the matters on the one hand and need to remedy any unfairness on the other. It is submitted that one of the observations of the Hon'ble Supreme Court in the said case is that the government must have freedom of contract and the decision of the government must not only be tested by application of wednesbury principle of reasonableness including its other facts but must be free from arbitrariness not affected by bias or actuated by malafide. The wednesbury principle has been laid down in the case of Associated Provincial Picture House Ltd. Vs. Wednesbury Corporation reported in (1948) 1 KB 223= (1947) 2 ALL ER 680(CA). It is submitted that the facts of the present case would reveal that it cannot be said to be case of wednesbury unreasonableness or perversity. The essentiality of condition must be in the hand of the employer and to power to deviate even from essential condition is inherent in the employer.

51. Learned senior counsel has distinguished the present case from all those cases cited on behalf of the petitioner by taking this Court through the facts of those cases vis-a-vis the facts of the present case. It is submitted that in all those cases the unsuccessful bidders had approached the Court when they failed to submit their bid within the time prescribed by the employer and were



contesting for second opportunity on the ground of technical glitches but the employer were not ready to accept the case of unsuccessful bidder. In some of the cases the unsuccessful bidders moved the Court under Article 226 of the Constitution to challenge rejection of their bids on various grounds. Learned senior counsel submits that reliance placed by the petitioner on the judgment of the Hon'ble Supreme Court in the case of **Maharashtra Housing Development Authority** (supra) is misplaced inasmuch as it would appear that in the said case the High Court of Bombay had not accepted the case of the NIC that the absence of acknowledgment of the submission of the bid by the first respondent-writ petitioner was on account of its omission to press the "freeze button" and as there was no technical glitch in the system the first respondent-writ petitioner was not entitled to any consideration of its otherwise defect. Learned senior counsel submits that in all those cases the employer was contesting the issues with the unsuccessful bidders whereas in the present case the employer has come forward to say that it has extended the deadline for submission of bid in accordance with the tender conditions by exercising its discretion and hence issues which had fallen for consideration before the Bombay High Court and the



Hon'ble Supreme Court are not similar much less identical in the facts of this case.

52. Learned senior counsel further submits that in the case of **G.K. Transport Company Ltd.** (supra) again there was no condition prescribed in the tender document like the present case. The tender document in the said case was not prescribing that in case of any conflict between the ITB and Bid Data Sheet it is the Bid Data Sheet which will prevail.

53. Learned senior counsel has also distinguished the present case with that of Division Bench judgment of the Hon'ble Karnataka High Court in the case of **Mahindra Sanyo Special Steel Pvt. Ltd.** (supra) by referring to the facts of the case and submits that again in the said case it was not the fact that the employer had extended the time for submission of bid rather the employer in the said case was contesting the issues with the appellant that the Hon'ble Karnataka High Court did not think it just and proper to give second opportunity to the appellant.

54. In the aforesaid background, learned senior counsel submits that it would only be in public interest to uphold the decision of the respondent no.1-Company as it would enhance the competitiveness in the commercial transactions.



Consideration

55. After hearing learned senior counsel for the parties and on perusal of the records, it appears to this Court that at the first instance the issue which arises for consideration is with regard to a legal interpretation to Clause '6' and '16' including their sub-clauses in the ITB read with the conditions under the IFB and BDS. Clause '6' and '16' of the ITB are thus quoted hereunder for a ready reference:-

"6.0 Amendment/Addendum to Bidding Documents

6.1 At any time prior to the deadline for submission of Bid, the Employer may, for any reason, whether at its own initiative, or in response to a clarification requested by a prospective Bidder, amend the bidding documents.

6.2 Any Addendum/Amendment thus issued shall be part of the Bid Documents pursuant to Sub-clause 4.1 and shall be communicated only through the portal <https://sjvn.abcpurchase.com>, www.eprocure.gov.in & www.sjvn.nic.in for viewing by the bidders. The amendments to the Bid Documents will be binding on the bidders and the notification of the amendment through portal, shall be deemed to be construed that such amendment(s) to the Bid Documents have been taken into account by the Bidder in its bid. Bidders are also advised to regularly check e-tender portal regarding posting of amendments if any.

6.3 In order to afford prospective Bidders reasonable time in which to take the amendment into account in preparing their bid, the Employer may, at its discretion, extend the deadline for the submission of bids, in accordance with Clause 16 and notify on portal



<https://sjvn.abcpurchase.com>, www.epurchase.gov.in & www.sjvn.nic.in where all prospective bidders may see the extended deadline.

.....

16.0 Deadline for Submission of Bids

16.1 Part-I (Techno-Commercial) Bids must be submitted online no later than the time and date stated in the Bid Data Sheets.

Original Bid Security, Integrity Pact/Deed of Joint Undertaking/Power of Attorney and all other documents as mentioned at clause 8.1.1 shall be submitted in physical form before stipulated bid submission time at the address specified in BDS. Employer shall not be liable for loss/non-receipt/late receipt of above documents in postal transit.

16.2 The Employer may, at its discretion, extend this deadline for submission of bids by amending the bidding documents in accordance with ITB Sub-Clause 6.3, in which case all rights and obligations of Employer and Bidders will thereafter be subject to the deadline as extended.

16.3 Complete Bids must be uploaded at the portal and hard copies of the documents mentioned in Clause 8 & Clause 15.1 of ITB must be received by the Employer at the address as specified in IFB/ITB/BDS no later than the time and date stipulated in the Bid Data. In the event of the specified date for the submission of bids being declared a holiday for the Employer, the hard copy of the documents will be received up to the specified time on the next working day. However, the date and time for online submission of the bids shall continue to be the date and time specified in the Bid Data or any amendment for the same.

Employer shall not be liable for loss/non-receipt/late receipt of above documents in postal transit.”



56. As noted above it is the contention of Mr. Ranjit Kumar, learned senior counsel representing the petitioner that the deadline for submission of the bids could not have been extended after 13.00 hrs (IST) on 05.03.2019 because the aforesaid clauses of the ITB did not permit the employer to bring an amendment after expiry of the deadline, Mr. S.B. Upadhyay and Mr. Parag Tripathi, learned senior counsel have argued that the employer had a discretion in terms of clause 16.2 read with clause 6.3 to extend the time after expiry of the deadline.

A glance over the case-laws

57. The parties here to have referred and relied upon a large number of judgments of the Hon'ble Apex Court, therefore this Court thinks it just and proper to discuss those judgments in order to find out their applicability in the facts of the present case.

Legal Interpretation of Tender Conditions

58. Both the parties have relied upon the judgment of the Hon'ble Supreme Court in the case of **Ramana Dayaram Shetty** (supra). In the said case, the Hon'ble Apex Court was considering paragraph 1 of the notice inviting tenders wherein the respondent no.1 had stipulated condition of eligibility by providing that a person submitting a tender must be a “registered IInd Class hotelier having at least 5 years’ experience”. The Hon'ble Apex



Court found that this was a condition of eligibility to be satisfied by every person submitting a tender and if in case of any person, this condition was not satisfied, his tender was ineligible for being considered. The Hon'ble Apex Court, therefore, held that the respondent no.1 being a State within the meaning of Article 12 of the Constitution or in any event a public authority, not entitled to depart from it at its own sweet will without rational justification. In the said case, the respondent no.4 had experience of catering only in canteens and did not have 5 years' experience of running a IInd Class hotel or restaurant and hence they did not satisfy the condition of eligibility, yet his tender was accepted. This was found to be in violation of the standard or norm of eligibility set up by respondent no.1 and the action of respondent no.1 in accepting the tender of respondents 4 was held invalid. The Hon'ble Apex Court while dealing with the condition prescribed in the tender, in paragraph 7 of the judgment held as under:-

“.....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.....”.

Principle of ‘Business Efficacy’

59. The legal principles for interpretation of a commercial contract came to be considered recently in the case of Nabha Power Ltd. (NPL) (supra). In the said case, the Punjab State Electricity Board (PSEB) conducted an international competitive bidding for selection of developer through tariff based bidding process for procurement of power on long-term basis from a power station to be set up at village-Nalash, Rajpura in the district of Patiala. The bidding documents were issued, certain queries and clarifications were raised by the prospective bidders. There was a specific query as to whether the coal to be supplied would be washed coal or unwashed coal, it was clarified that washing of coal was to be arranged by the successful bidder. On the question of the costs associated with fuel supply, transportation and unloading being pass through, it was clarified that tariff payment will be in accordance with Schedule VII of Power Purchase Agreement (PPA). M/s L&T Power Development Ltd. was declared as the successful bidder. The power purchase agreement



was entered into between PSEB and NPL. The NPL was incorporated as a special purpose vehicle (SPV) for implementation of the project and the successful bidder was to acquire 100% shareholding of NPL and enter into a 25 year power purchase agreement with PSEB. Accordingly, the contractual obligation began. Certain disputes arose when certain deductions were made from the amount due and payable under the invoices. The Hon'ble Apex Court was called upon to interpret the terms of the contract between the parties. The appellant in the case also invoked the principle of “**business efficacy**” and the **maxim reddendo singula singulis** for interpreting the terms of the ‘PPA’ and the energy charges formula as set out at Article 1.2.3 of Schedule 7 of PPA. The Hon'ble Apex Court in its judgment in the case of Nabha Power Limited (NPL) (supra) went through the developments of law on the principle of business efficacy to the transactions and after referring to Moorcock, Shirlaw Vs. Southern Foundaries, Reigate Vs. Union Manufacturing Company, Liverpool City Council Vs. Irwin, Young & Marten Ltd. V. McManus Childs Ltd., Collins V. Hopkins, Readhead s. Midland Railway Co. and Hancock Vs. B.W. Brazier (Anerley) Ltd., recorded in paragraph 43, 44, 46, 47 and 48 as under:-

“43. A parallel development in Australia arose out of a judgment of the Lords of the Judicial Committee of the Privy Council in the



*appeal preferred from the Full Court of the Supreme Court of Victoria in B.P. Refinery (Westernport) Proprietary Limited vs. Shire of Hastings*²⁶. On the implication of the terms of contraction five conditions were laid down and a reference was, once again, made to *The Moorcock*³, *Reigate vs. Union Manufacturing Co. (Ramsbottom) Ltd.*⁵ and *Shirlaw v. Southern Foundries (1926) Ltd.*⁴ in the following terms:

“40. Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

41. Their Lordships venture to cite only three passages - albeit they are familiar to every student of this branch of the law. In *The Moorcock*³ (19) Bowen LJ said: (Pdp.68)

‘...I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men...’

26 1977 UKPC 13: (1977)180 CLR 266(AUS)

3 (1889) LR 14 PD 64 (CA)

5 (1918) 1 KB 592 (CA)

4 (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)



It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself.

*In Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.*⁵,
Scrutton, LJ said: (Kbp.605)

5 (1918) 1 KB 592 (CA)

'...A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case?", they would both have replied: "Of course, so and so will happen; we did not trouble to say that; it is too clear."

*'In Shirlaw v. Southern Foundries (1926) Ltd*⁴, *MacKinnon LJ said: (Kbp.227)*

"....Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, "Oh, of course!"'"
(Emphasis supplied)

44. The next development, was in *Investors Compensation Scheme Ltd. vs. West Bromwich Building Society*²⁷. Lord Hoffmann, in his majority opinion, prefaced his

⁴ (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)

²⁷ (1998) 1 WLR 896: (1998) 1 All ER 98(HL)



explanation of reasons with some general remarks about the principles which contractual documents are nowadays construed – common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of “legal” interpretation was observed to have been discarded, and the principles summarized as follows: (WLR pp.912 H-913F)

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words.



The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.²⁸ (1997) AC 749

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in [Antaios Compania Naviera S.A. v. Salen Rederierna A.B.](#)²⁹ (AC.p201):

‘.....if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.’”

46. There were, once again, parallel developments in India during this period in various High Courts but the views of this Court can be found expression in [Dhanrajamal Gobindram vs. Shamji Kalidas and Co.](#)³³ (AIR pp.1291-92, para 19):

“19.Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible. This was laid down by



the House of Lords in [Hillas & Co. v. Arcos Ltd.](#)³⁴ and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is [Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.](#)³⁵ There, the clause was “This bill of lading”, whereas the document to which it referred was a charter-party. Viscount Simonds summarised at ACp. 158 all the rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.”

47. *In [The Union of India vs. D.N. Revri & Co.](#)³⁶ P.N. Bhagwati, J. (as he then was), speaking for the Bench of two Judges said in para 7 as under: (SCCp.151)*

“7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.....”

48. *Lastly in [Satya Jain vs. Anis Ahmed Rushdie](#)³⁷, Ranjan Gogoi, J., elucidated the well established principles of the classic test of business efficacy to*



achieve the result of consequences intended by the parties acting as prudent businessmen. It was opined as under: (SCC pp.143-44, paras 33-35)

“33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock³. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in Moorcock³ sums up the position (PD p. 68)

“... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.”

34. Though in an entirely different context, this Court in United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera³⁸ had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and



between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

“51. ... ‘... “Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course!”” Shirlaw v. Southern Foundries (1926) Ltd.⁴ KB p.227

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‘... An expressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.” [Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board](#)³¹ WLR p. 609C-D :ALL ER p. 268 a-b).’”
(emphasis in original)

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement.....”

60. After referring to the aforesaid judicial pronouncements ultimately in paragraph 72 of the judgment in



Nabha Power Limited (NPL), the Hon'ble Apex Court put a word of caution as under:-

“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any ‘implied term’ but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”

61. Keeping in mind the aforesaid principles of interpretation of the contract document/tender conditions when this Court goes through the relevant stipulations present in the IFB, it is found that the bidders were requested to get themselves



registered well in advance, they were informed that no extra time will be considered for the delay in online vendor registration, if any. There is no dispute that the respondent no.4 in this case had got itself registered online well before the deadline for submission of the bids. The further stipulation provides that “....In case bidders wait till the last moment for registration/uploading of Bids, and if any technical problem is encountered at that time and the closing time may elapse, SJVN Thermal (P) Ltd. shall not be responsible in any manner for such delay/or any other reason thereof.” Thus, by providing the aforesaid stipulations, the respondent no.1 had made it clear that it would not be responsible for the technical issues which may be encountered by the prospective bidder at the last moments.

62. By yet another stipulation in the IFB, the respondent no.1 provided that “At any time before the submission of Bids, SJVN Thermal (P) Ltd. may modify/amend the Tender document and extend the last date of submission/opening of the Bid and any other key dates by issuing a corrigendum/addendum and such corrigendum/addendum to this notice as well as to the Tender document shall be available only on following websites:

A) www.sjvn.nic.in

B) www.eprocure.gov.in

C) <https://sjvn.abcpocure.com>



63. As such the bidders were advised to visit the above websites regularly before deadline for submission of bid. The aforesaid condition stipulated in the clause 4.2.1 of the IFB is to be read along with clause 5.1. According to clause 5.1 of the ITB a prospective bidder requiring any clarification to the bidding documents may notify the employer through e-mail or in writing by post at the address indicated in clause 14 of Section-I (IFB), Volume I and the employer had to respond to such requests through the portal by clarifying the same in the pre-bid meeting.

64. Clause 6.1 is the enabling provision wherein at any time prior to the deadline for submission of the bid, the employer may amend the bid documents. It is this cluster of words 'at any time prior to the deadline for submission of the bid' (emphasis supplied) which has been read again and again in course of argument on behalf of the petitioner to contend that any amendment of the bid documents could have taken place only prior to the deadline for submission of the bids. Clause 6.2 provides the manner in which addendum/amendment in the bid document shall be communicated for viewing by the bidders. It also provides that any addendum/amendment thus issued shall be part of the Bid Documents pursuant to Sub-clause 4.1. Thus clause 6.2 takes care of communication of amendment/addendum if any



brought in terms of clause 6.1. So far as clause 6.3 is concerned, it provides that in order to afford prospective Bidders reasonable time in which to take the amendment into account in preparing their bid, the Employer may, at its discretion, extend the deadline for the submission of bids, in accordance with Clause 16 and notify on portal where all prospective bidders may see the extended deadline . Here it is important to note that clause 16.1 talks of submission of bid online no later than the date and time fixed in the bid data sheet (BDS). Thus clause 6.3 assumes it's importance keeping in clause 16.1, 16.2 and 16.3.

65. Now a question arises as to why after providing for the powers on the employer to bring any amendment/addendum to the bidding documents at any time prior to the deadline for submission of the bids and then after conferring discretion to extend the deadline for submission of the bids, the employer (respondent no.1) provided clause 16 (deadline for submission of the bids) and once again incorporated clause 16.2 saying that the employer may, at its discretion, extend this deadline for submission of the bids by amending the bid documents in accordance with the ITB sub-clause 6.3. To understand this, it would be necessary to go through clause 16.1 which says that Part-I (Techno-Commercial) Bids must be submitted online no



later than the time and date stated in the Bid Data Sheets. It may be seen that in the 'IFB' the employer has provided the date and time for submission of the bid but under clause 16.1 of the ITB it is provided that the deadline for submission of the online bids of part I will be no later than the time and date stated in the Bid Data Sheets, thus, it appears to this Court that it is the time and date in the bid data sheet which would be the deadline for submission of the bids and clause 16.2 confers power upon the employer to extend the deadline for submission of the bids by amending the bidding documents which includes the bid data sheets. Section III of the tender document is the Bid Data Sheets and the opening lines of the Bid Data Sheets read as under:-

"The following bid specific data for the Plant & Equipment to be procured shall amend and/or supplement the provisions in the Instructions to Bidders (ITB). Whenever there is a conflict, the provisions herein shall prevail over those in the ITB." (underline is mine)

66. Part 'D' of the Bid Data Sheets deals with the submission of the bids. The deadline for submission of the bids with reference to clause 16.1 of the ITB is provided in the table under the heading submission for bid as under:-

"Date and time as stated in IFB/subsequent communication issued by Employer, if any". (underline is mine)



67. Clause 6.3 of the ITB also refers clause '16' and it provides in it's second part that the employer may, at its discretion, extend the deadline for submission of the bids, in accordance with clause 16 and notify on portal where all prospective bidders may see the extended deadline. Clause 6.3 instead of talking of 6.1, talks of clause 16 which in turn talks of deadline provided in the Bid Data Sheets. This Court has already held hereinabove that Clause 16.2 confers power upon the employer to extend the deadline for submission of the bids as envisaged under the 16.1 (Bid Data Sheets). This Court is willing to agree with the submissions of learned senior counsel for the respondents that Clause 16.2 has consciously not incorporated the words "**at any time prior to the deadline for submission of the bids**" as occurring under clause 6.1 of the ITB. If it would have been the intention of the employer to prohibit the employer from extending the deadline for submission of the bids after expiry of time, there was no reason as to why the embargo created under Clause 6.1 of the ITB could not have been incorporated and reiterated in Clause 16.2. Clause 16.2 only refers to Clause 6.3 when it says that the employer, may at its discretion, extend this deadline for submission of the bids by amending bidding documents in accordance with ITB sub-clause 6.3, in which case all rights and



obligations of employer and bidders will thereafter be subject to the deadline as extended.

68. To me it appears that the reference of Clause 6.3 has been purposely made to ensure that the extension of deadline for submission of bid be notified in the same manner so as to confer equal opportunity to all the bidders and to maintain level playing field. Clause 16.2 thus wipe out any chance of unreasonableness in the decision making process. Again clause 16.3 reiterates that complete bids must be uploaded at the portal no later than time and date stipulated in the bid data sheets. The Bids Data Sheets nowhere prescribes a condition that the subsequent communication issued by the employer, if any must be before expiry of the first deadline. Even if it is assumed for a moment that there is any conflict in clause 6.1 and the bid data sheets with reference to clause 16.1, it is the bid data sheets which will prevail.

69. In the case of **Ramana Dayaram Shetty** (supra) the Hon'ble Apex Court has held that word used in the documents are not superfluous or redundant and those must be given some meaning and weightage. Following the ratio of the judgment of the Hon'ble Apex Court in the case of **Ramana Dayaram Shetty** (supra), this Court would come to a conclusion that in fact clause 16.1 read with opening words of the Bid Data Sheets saying that in



case of conflict between the provisions of the ITB and the Bid Data sheets it is the provision of the Bid Data Sheets shall prevail, confers a wide power on the employer to come out with subsequent communication with regard to the deadline for submission of the bid. The word 'subsequent' has been used under the heading 'deadline for bid submission', thus intention of the employer is very clear, the employer has got power to come out with subsequent communication. The full meaning of the word 'subsequent' is to be given and that would lead to a conclusion that the deadline for bid submission may be amended by a subsequent communication issued by the employer after expiry of the deadline. It would be naturally before opening of the bids if any already submitted. This Court agrees with the submission of the respondents that clause 6.1 has purposely not been taken care of in clause 16.2 of the ITB and the reference of clause 6.3 is only with regard to the procedures to be followed when the employer in its discretion decides to extend the deadline for submission of the bids by way of a subsequent communication as envisaged in the Bid Data Sheets.

70. Once by way of a subsequent communication issued by the employer a fresh deadline for submission of bid is communicated, the earlier deadline gets extended as it gets a new



lease of life. The contention of the learned senior counsel for the petitioner that the word 'extension' presupposes/implies a continued existence of something to be extended seems not in the context of the tender document in this case. Reliance placed on the judgment of the Hon'ble Supreme Court in the case of **Provas Chandra Dalui** (supra) is in the context of a lease deed. The Hon'ble Supreme Court in paragraph 14 of its judgment in the case of **Provas Chandra Dalui** (supra) held as under:-

"14. It is pertinent to note that the word used is 'extension' and not 'renewal'. To extend means to enlarge, expand, lengthen, prolong, to carry out further than its original limit. Extension, according to Black's Law Dictionary, means enlargement of the main body; addition of something smaller than that to which it is attached; to lengthen or prolong. Thus extension ordinarily implies the continued existence of something to be extended. The distinction between 'extension' and 'renewal' is chiefly that in the case of renewal, a new lease is required, while in the case of extension the same lease continues in force during additional period by the performance of the stipulated act. In other words, the word 'extension' when used in its proper and usual sense in connection with a lease means a prolongation of the lease. Construction of this stipulation in the lease in the above manner will also be



consistent when the lease is taken as a whole. The purposes of the lease were not expected to last for only 10 years and as Mr. A.K.Sen rightly pointed out the schedule specifically mentioned the lease as “for a stipulated period of 20 years”. As these words are very clear, there is very little for the court to do about it.”

71. The Hon’ble Apex Court has in the case of **Bharat Petroleum Corporation Ltd. And Anr. Vs. N.R. Vairamani & Others reported in (2004) 8 SCC 579** held that the judgment of the Hon’ble Apex Court be not cited like Euclid’s theorems. Their Lordships held that a slightest of change in the facts of the case would make a sea difference in the judgment. Paragraph ‘9’ of the judgment in the case of **Bharat Petroleum Corporation Ltd.** (supra) is quoted hereunder for a ready reference:-

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid’s theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving



Dock Co. Ltd. V. Horton² (AC at P.761) Lord MacDermott observed:(All ER p.14 C-D)

“The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,...”

72. Keeping in mind the judgment of the Hon'ble Supreme Court in the aforementioned case of **Bharat Petroleum Corporation Ltd.** (supra) when this Court looks into a judgment of the Hon'ble Supreme Court in the case of **Provas Chandra Dalui** (supra), it is found that in the said case the appellants claimed that they had exercised their option of extension of a lease deed at the expiry of 10 years for a period of 5 years i.e. from April 1, 1956 to March 31, 1961 on increased rental of Rs.250 per month and then for the second term of 5 years from April 1, 1961 to March 31, 1966 at the increased rental of Rs.300 per month. During the lease, on March 31, 1959 the instant second respondent by a registered instrument transferred the land to the first respondent who thereby became the landlord. The first respondent instituted a Title Suit No.56 of 1966 on the allegation against the appellants that the appellants failed to exercise the option of extension for one year at an enhanced rent of Rs.500 and also failed to give peaceful and vacant possession of the land. The



defence of the appellants was that they did not exercise option of renewal after the expiry of the original term of 10 years as they became thika tenants from February 28, 1949 i.e. on the date of commencement of the Calcutta Thika Tenancy Act, 1949 as admitted by the plaintiff's predecessor in interest. The second respondent in Miscellaneous Execution Case No.126 of 1953 (Thika) before the Controller under the Calcutta Thika Tenancy Act, 1949. In the facts of the said case, the Hon'ble Supreme Court framed two questions to be decided in the case namely whether the appellants acquired the status of thika tenants in respect of the lease and whether there was estoppel, waiver, acquiescence or res judicata on the part of the respondents as in earlier proceedings they treated the appellants as thika tenants before the Controller.

73. In paragraph 10 of the judgment in the case of **Provas Chandra Dalui** (supra), the Hon'ble Supreme Court held as under:-

'10. 'Ex praecedentibus et consequentibus optima fit interpretatio.' The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected 'ex antecedentibus et consequentibus,' every part of it may be brought into action in order to collect from the whole one uniform and



consistent sense, if that is possible. As Lord Davey said in N.E. Railway Co. v. Hastings¹ (1900 AC 260, 267):

..... the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed it that interpretation does no violence to the meaning of which they are naturally susceptible.....

In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and they should apply.

74. On going through the aforesaid judgments of the Hon'ble Supreme Court, it is crystal clear that every document is to be construed with reference to its object and whole of its terms, this view is also in consonance with the judgment of the Hon'ble Supreme Court in the case of **Ramana Dayaram Shetty** (supra). In the facts of the case before the Hon'ble Apex Court in **Provas Chandra Dalui** (supra) what has been observed by Their Lordships in paragraph '14' is all about the original meaning of the word 'extension'. In the present case we are concerned with a legal interpretation of the terms and conditions of the tender document with reference to the various stipulations present including the



clauses of the bid data sheet which specifically refers to subsequent communication by the employer.

75. It is not in dispute that the petitioner has chosen to participate in the tender knowing fully well the stipulations present in the bid data sheet. Thus, in the opinion of this Court, the meaning of the word 'extension' in the context of the present case has to be understood by reading together the word 'subsequent communication by the employer' as occurring in the 'BDS'.

76. By way of subsequent communication if the employer has provided for a power to extend the deadline for submission of bids by amending the bid documents the word 'extension' must be interpreted harmoniously to give effect to all other clauses. I therefore with due respect do not agree with the submission of learned Senior counsel for the petitioner.

77. This Court also finds no reason to look to any implied terms of the contract on the principle of "business efficacy". The Hon'ble Supreme Court has in the case of **Nabha Power Limited** (supra) extended the word of caution in paragraph 72 and this Court would follow the same. In the facts of the present case, this Court would have no hesitation in saying that the Court is not really required to read any "implied term" as the express terms of the tender document which have been referred



hereinabove would lead this Court to conclude that the employer in the present case was acting well within the conditions present in tender documents in exercising its power to extend the deadline for submission of the bids by issuing a subsequent communication. The 'Penta Test' is not satisfied in this case.

78. A submission has been made before this Court that the extension of deadline for submission of the bids was done with an oblique motive to favour the respondent no.4. In the opinion of this Court, save and except the bald statements of the petitioner, there is no material available on the record to even prima-facie demonstrate that the extension of deadline was done with any oblique motive. In course of argument, learned senior counsel for the petitioner has gone on to submit as to who knows what transpired between two managing directors of the two public sector undertakings, in the opinion of this Court, these are mere suspicion raised by the petitioner which cannot take place of proof. Petitioner is not able to make out a case of prejudice to the petitioner.

Scope of Judicial Review

79. Now, coming to the submissions on the scope of judicial review in the matters relating to award of tender. A large number of judgments have been cited at the bar. The scope of



judicial review has been discussed and principles laid down by the Hon'ble Apex Court have settled the propositions of law as to the conditions which would be required to be satisfied for the purpose of interference with the decision in the matter of award of tenders by a Court sitting under Article 226 of the Constitution of India in contractual matters.

80. In the case of **Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651** in paragraph 94 the Hon'ble Supreme Court has emphasized need to find a right balance between the administrative discretion to decide the matters on the one hand and need to remedy any unfairness on the other.

81. In the case of **Raunaq International Ltd. Vs. I.V.R. Construction Ltd. And Others reported in (1999) 1 SCC 492**, the Hon'ble Supreme Court was considering the impugned order of the Hon'ble High Court of Bombay by which the High Court had stayed the operation of the letter of intent dated 20.07.1998 issued to M/s Raunaq International Ltd. In the said case the Board of Directors of Maharashtra State Electricity Board considered the offer of M/s Raunaq International Ltd. Which was not meeting the qualifying requirements but it was reported that the company had done CW piping for 210 MW units. The qualifying requirements of bidder was that the bidder should have designed,



fabricated/manufactured, supplied, erected and successfully commissioned large diameter piping system comprising the supply of MS pipes not less than 2000 mm diameter and laid/buried for a minimum total length of 3 kms in a thermal power station and the same should be in successful operation for the past two years. When the bid of M/s Raunaq International Ltd. was accepted and tender was awarded to them, the another bidder M/s I.V.R. Construction Ltd. Challenged the decision of the Court.

82. The Hon'ble Supreme Court considered the challenge made to the interim order staying the award of tender to M/s Raunaq International Ltd. and found that relaxation of criteria would have been required in respect of M/s I.V. R. Construction Ltd. also and in view of the fact that the offer of M/s Raunaq International Ltd. was the lowest, if the Board had accepted the offer of M/s Raunaq International Ltd. after weighing their requirements against the qualifications of the two competing bidders, the High Court could not have intervened and stayed the operation of the award of contract to M/s Raunaq International Ltd. The Hon'ble Supreme Court also noted that no mala fides have been alleged against any member of the Board of Directors and there was no allegation of any collateral motive for awarding



the contract to M/s Raunaq International Ltd. Having said so in paragraph 9 and 10 their Lordships held as under:-

“9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be :

(1) The price at which the other side is willing to do the work;

(2) Whether the goods or services offered are of the requisite specifications;

(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.



10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods. e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.”

83. In the case of Air India Ltd. Vs. Cochin International Airport Ltd. And Others reported in (2000) 2 SCC 617 while relying upon the judgment in the case of Tata Cellular (supra) and **M/s Raunaq International Ltd.** (supra), the Hon'ble Supreme Court was considering the challenge to the judgment of the Hon'ble Division Bench of Kerala High Court arising out of a dispute raised by Cambatta Aviation Ltd. against the action of Cochin International Airport Ltd. (in short 'CIAL') in the matter of award of contract for ground-handling services at the new Cochin Airport at Nedumbassery to AIR India Ltd. The



learned single Judge had dismissed the writ application finding no arbitrariness or illegality in the award of contract but the Hon'ble Division Bench held that the action was violative of the principles of natural justice, arbitrary and illegal. The allegation was that 'CIAL' had not acted fairly and impartially as it had carried on negotiations with Air India behind the back of Cambatta and no opportunity was given to Cambatta to give a better offer. In the said case in paragraph '7' their Lordships held as under:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in [Ramana Dayaram Shetty v. International Airport Authority of India](#)¹, [Fertilizer Corporation Kamgar Union \(Regd.\) v. Union of India](#)², ; [CCCE v. Dunlop India Ltd](#)³, [Tata Cellular v. Union of India](#)⁴, ;. [Ramniklal N. Bhutta v. State of Maharashtra](#)⁵, and [Raunaq International Ltd. v. I.V.R. Construction Ltd.](#)⁶, . The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter

¹ (1979) 3 SCC 489

² (1981) 1 SCC 568

³ (1985) 1 SCC 260; 1985 SCC (Tax) 75

⁴ (1994) 6 SCC 651

⁵ (1997) 1 SCC 134

⁶ (1999) 1 SCC 492



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

84. In the case of Michigan Rubber (India) Ltd. Vs. State of Karnataka and others reported in (2012) 8 SCC 216, the Hon’ble Supreme Court once again considered the nature and scope of judicial review under Article 226 of the Constitution of India. In the said case the pre-qualification criteria incorporated in



the tender floated by Karnataka State Road Transport Corporation was sought to be challenged by filing a writ application, the said criteria was withdrawn by the Corporation and thereafter a modified pre-qualification criteria was issued vide subsequent tender. Being aggrieved by the new pre-qualification criteria the appellant preferred a writ petition before the Hon'ble High Court which was dismissed by the learned Single Judge and when the matter went to the Hon'ble Division Bench of the High Court, the Division Bench also dismissed the same. In the Special Leave to Appeal before the Hon'ble Supreme Court it was submitted that the pre-qualification criteria as specified in Conditions 2(a) and 2(b) [amended conditions 4(a) and 4(b)] of the tender in question is unreasonable, arbitrary, discriminatory and opposed to public interest in general and these conditions were incorporated to exclude the appellant Company and other similarly situated companies from the tender process on wholly extraneous grounds. The appellant Company also contended that it was successfully selected in previous three contracts and had supplied their products to the Corporation without any complaint at any point of time.

85. After referring to the aforementioned judgments in the case of **Tata Cellular** (supra) and **M/s Raunaq International Ltd.** (supra), their Lordships referred the judgment of the Hon'ble



Supreme Court in the case of **Union of India Vs. International Trading Company** reported in (2003) 5 SCC 437. Paragraph 13 of the judgment in the case of **Michigan Rubber (India) Ltd.** (supra) reads as under:-

13.[In Union of India & Anr. vs. International Trading Co. & Anr.](#)⁶, this Court, in similar circumstances, held as under: (SCC pp.445 and 447, paras 15-16 and 22-23)

“15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of [Article 14](#) is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of [Article 14](#) and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. 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. Actions are amenable, in the panorama of judicial review only to the extent that 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 than precisely defined. A 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.

16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

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22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the

6 (2003) 5 SCC 437



national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; 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 condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.”

86. Learned senior counsel for the petitioner as well as learned senior counsel for the respondents have relied upon these judgments by reading certain paragraphs in their own manner. While it is the contention of Mr. Ranjit Kumar, learned senior counsel for the petitioner that if the State or its instrumentalities acted unfairly and unreasonably, the action of the State are amenable to the judicial review, learned senior counsel for the



respondents submit that it is only when the arbitrariness in the decision making process is hit by the wednesbury principle of unreasonableness or perversity that the court should interfere with the decision of the State. The attention of this Court has been drawn towards the observations of the Hon'ble Supreme Court in the case of **Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517 (para 22)** wherein their Lordships have recorded inter-alia as under:-

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



thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

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

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

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

87. In the case of Maa Binda Express Carrier & Another Vs. North-East Frontier Railway and Others reported in (2014) 3 SCC 760 again the scope of judicial review in the matter relating to award of contract between the State and its instrumentalities came to be considered. In the said case, a notice inviting tender was issued by the Divisional Commercial Manager, Tinsukia inviting tenders for grant of three years lease of 23 tonnes of space in VPH (Parcel Van) on Train No.15960/15959 Kamrup Express. The appellant responded to the tender notice and offered a sum of Rs.1,46,872 per trip for the proposed lease. The tender



process was however discharged by the railway administration on account of technical and administrative reasons. The appellant contested the same contending that he was the highest bidder. It was contended on behalf of the Railways that the appellant had not acquired vested right for allotment of the contract in its favour merely because its bid was found to be the highest and that the power to cancel/withdraw the tender notice had been specifically reserved by the railway administration in its favour.

88. After relying upon the aforementioned judgments of the Hon'ble Supreme Court and referring to the settled legal propositions from the judgment in the case of **Meerut Development Authority Vs. Association of Management Studies reported in (2009) 6 SCC 171**, their Lordships held that “in the matter of award of contracts the government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest....” (underline is mine). It was thereafter held that decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the



legality and propriety affecting the validity of the tender process would have arisen. By cancelling the tender process the competent authority had not violated any fundamental right of the appellant.

89. In the case of **Central Coalfields Limited and Another Vs. SLL-SML (Joint Venture Consortium) and Others reported in (2016) 8 SCC 622** the appellant was aggrieved by the judgment and order of the Hon'ble Division Bench of the Jharkhand High Court whereby the rejection of the bid of the first respondent SLL-SML by Central Coalfields was set aside. A dispute in the said case arose when first respondent was found non-responsive because they had submitted a bank guarantee not in the prescribed proforma but in another format in respect of some other contract provided in the general terms and conditions. The CCL being the employer did not agree to deviate from the terms of the tender document in which under clause 3 the heading "Deposit of EMD" it was clearly provided that the earnest money can be deposited in the form of demand draft or can also be deposited in the form of irrevocable bank guarantee (BG) from any scheduled bank in the format given in the bid document. Since the format given in the bid document was different from the one in which the bank guarantee was submitted by the first respondent, the CCL refused to deviate from the tender conditions. The first



respondent submitted that CLL should deviate from its conditions, but Hon'ble Supreme Court relied on the judgment of the Hon'ble Supreme Court in the case of **G.J. Fernandez. Vs. State of Karnataka reported in (1990) 2 SCC 488** in which their Lordships reaffirmed the principles laid down in **Ramana Dayaram Shetty** (supra). Paragraph '38' of the judgment in Central Coalfields Ltd. reads as under:-

“38. In G.J. Fernandez v. State of Karnataka⁶ both the principles laid down in Ramana Dayaram Shetty⁵ 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 Ramana Dayaram Shetty⁵ sense.”

90. The Hon'ble Supreme Court in **Central Coalfields Ltd.** (supra) then referred the judgment in the case of **Poddar Steel Corpration V. Ganesh Engineering Works reported in (1991) 3 SCC 273** arising out of the judgment of the Hon'ble Allahabad High Court wherein the concept of “Essential Term”

⁵ (1979) 3 SCC 489

⁶ (1990) 2 SCC 488



was introduced and the Hon'ble High Court held that clause in NIT relating to deposit of earnest money was an essential term thereof and could not be deviated from, but in appeal before the Hon'ble Supreme Court, though the Hon'ble Supreme Court accepted the theory of essential and non-essential or ancillary or subsidiary terms of an NIT but held that cheque of Union Bank of India issued by Poddar Steel (though a deviation from the terms of the NIT) was sufficient for meeting the conditions of NIT. It was also held that the employer could waive the "technical literal compliance" of the earnest money clause of NIT "specially when it was in its interest not to reject the said bid which was the highest." In paragraph 42 of the judgment in Central Coalfields Ltd. however, the Hon'ble Apex Court observed as under:-

"Unfortunately, this Court in Poddar Steel³ did not at all advert to the privilege-of-participation principle laid down in Ramana Dayaram Shetty⁵ and accepted in G.J. Fernandez⁶. 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.³"

91. The Hon'ble Apex Court thereafter referred the accepted principle of the inherent authority of an employer to

⁶ (1900) 2 SCC 488

³ (1991) 3 SCC 273



deviate from the terms and conditions of an NIT and reintroducing the privilege-of-participation principle and the level playing field concept in the decision making process in respect of a commercial contract, it was held that “...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...” (underline is mine).

92. In paragraph ‘48’ of the judgment in **Central Coalfields Ltd.** (supra), their Lordships held as under:-

“48. Therefore, whether a term of 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 Shetty⁵. 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.”

93. In the case of State of **Jharkhand and others Vs. CWE-Soma Consortium reported in (2016) 14 SCC 172** when the tender committee found that out of three bidders who had participated in the tender process only the respondent was



responsive and the other two bidders were unresponsive, the Tender Committee took a decision to cancel the tender and go for retender to make the tender process more competitive. The decision of the tender committee was challenged. The learned Single Judge allowed the writ petition holding the action of the appellants as arbitrary and against public interest. The Division Bench concurred with the conclusion of the learned Single Judge. In appeal before the Supreme Court it was contended placing reliance upon Rajasthan Housing Board Vs. G.S. Investments (2007) 1 SCC 477 and U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma (2013) 5 SCC 182 that so long as the bid has not been accepted, the highest bidder acquired no vested right to have the auction confirmed in his favour (emphasis supplied). Having noticed the facts of the case in paragraph '13' of the judgment their Lordships held as under:-

“13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant and Ors. v. Satyawani⁵; Rajasthan Housing Board v. G.S. Investments³ and U.P. Avas Evam Vikash Parishad and Ors. v. Om Prakash Sharma⁴.”



94. In the case of **Reliance Energy Ltd. (supra)** their Lordships of the Hon'ble Supreme Court discussed the 'legal certainty' principle which is an important aspect of the rule of law and held in paragraph '36' as under:-

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. [Article 14](#) of the Constitution embodies the principle of "non-discrimination". However, it is not a free- standing provision. It has to be read in conjunction with rights conferred by other articles like [Article 21](#) of the Constitution. The said [Article 21](#) refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of [I.R. Coelho vs. State of Tamil Nadu](#)³, [Article 21/14](#) is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing [Article 19\(1\)\(g\)](#) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When [Article 19\(1\)\(g\)](#) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an

⁵ (1996) 4 SCC 208

³ (2007) 1 SCC 477

⁴ (2013) 5 SCC 182; (2013) 2 SCC (Civ)737



important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in [Article 19\(1\)\(g\)](#) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in [Article 19\(1\)\(g\)](#). Time has come, therefore, to say that [Article 14](#) which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with [Article 21](#) which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. [Article 14](#) applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

95. Learned senior counsel for the petitioner while placing reliance upon the judgment of the Hon'ble Supreme Court in the case of **Maharashtra Housing Development Authority** (supra) emphatically contended before this Court that in the said case the Hon'ble Supreme Court found from the report of the NIC



that there was no technical glitch, the Hon'ble Apex Court refused to grant a second opportunity to the bidder (the first respondent) and judgment of the Hon'ble Bombay High Court was set aside.

96. Contesting the said submissions of learned senior counsel for the petitioner, Mr. Parag P. Tripathi, learned senior counsel for the respondent no.4 has strongly contended that a bare perusal of the facts of the present case would show that it has a totally different situation inasmuch as it is evident from the report of the R-5 that the R-4 was in touch with R-5 from a prior time before the deadline of submission of the bid. It is not a case like Shapoorji Pallonji (the first respondent in the said case) where the bidder was found to be negligent and had failed to press "freeze button." It is a case where the R-4 had gone in the hand of the R-5 by giving remote access of its system to R-5 even before deadline of submission of bid, but because of the technical glitch the process could not be completed even though the entire tender documents had already been uploaded. He has also submitted that there was a technical glitch is evident from the report of the R-5 though it says that the technical glitch was in the system of R-4 but it would be a disputed question of facts to say as to where the technical glitches existed at the relevant time and this Court sitting under Article 226 of the Constitution of India need not go into



those disputed question of facts which would require taking of evidence.

97. The reliance placed on the judgment of the Hon'ble Bombay High Court in **G.K. Transport Company Vs. Western Coalfield Ltd. (2014) SCC Online Bom.1030** on behalf of the petitioner has also been contested by pointing out that in the said case there was no clause in the tender document for extending the deadline after expiry of the deadline for submission of the bids, whereas in the present case there was an express clause in the ITB read with BDS wherein the deadline for submission of the bids could have been extended by a subsequent communication.

98. To this Court it appears that the judgment of the Hon'ble Supreme Court in **Shapoorji Pallonji** (supra) and that of the Hon'ble Bombay High Court in **G.K. Transport** (supra) are well distinguishable and the Court accepts the submissions of learned senior counsel for the respondents that in both the cases not only the facts were different but were also a contest between the employer on the one hand and the bidder who had failed to submit the bid on time on the other hand. In this case the employer is contesting with the petitioner who is challenging the entry of R-4 after extension of time.



Epilogue

99. In the earlier part of its judgment this Court has come to a conclusion that the employer had a discretion available to extend the deadline for submission of the bids by a subsequent communication. Now going through the aforesaid judicial pronouncements on the scope of judicial review and by putting two questions which have been pointed out in the case of **Jagdish Mandal** (supra) to itself when this Court tests the contentions on behalf of the petitioner, it would come to a conclusion that the decision to extend the deadline for submission of the bid after expiry of 13.00 hrs on 05.03.2019 would not attract the principle of wednesbury unreasonableness and perversity. In no way it affects the sanctity of tender. This Court also finds that no discrimination has been made and the decision of the employer does not violate the doctrine of “level playing field”. It is found that the employer had notified the extension of time and date in accordance with the mode of communication to all the bidders as per tender document. It is not the case of the petitioner that the decision to extend the deadline was notified only to the respondent no.4. The level playing field was thus maintained. The petitioner has also visited his tenders during the extended period and even though no changes were incorporated in the tenders by the



petitioner during the extended period, the petitioner had repeatedly assured itself with the correctness of its tender by visiting on the portal at least on 11 occasions. This has given the level playing field to all the bidders or prospective bidders.

100. So far as the issues raised with regard to the technical glitches are concerned, this Court is also satisfied on perusal of Annexure- '5' and '6' to the writ application that they refer to technical issues being faced by the bidders in submission/uploading of bid on SJVN e-tender portal. Annexure-5 and 6 cannot be interpreted to read as if they say that the technical issues were with the SJVN's e-tender portal. Since this Court has taken a view that the employer had power to extend the deadline for submission of the bid after expiry of the period in the facts of the present case, this Court need not go into making an inquiry as to where exactly the technical glitches were existing before 13.00 Hrs (IST) on 05.03.2019.

101. The another issue which this Court considers is as to whether or not the decision to extend the deadline for submission of the bid is in public interest. The Court is of the considered opinion that public interest would be served only if larger participation is allowed in the matter of public tenders floated by the government and its instrumentalities. The



competitiveness of the bidders would be in public interest and any attempt to scuttle and throttle the competition at the outset would go against the public interest.

102. This Court would also strengthen its view to approve the decision making of the respondent no.1 Company by relying upon the judgment of the Hon'ble Apex Court in the case of *Caretel Infotech Ltd. (supra)*. In paragraph 40 of the said judgment their Lordships after referring to **Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited (2016) 16 SCC 818** reiterated that the author of the document is the best person to understand and appreciate its requirements. I would agree with the submission of learned senior counsel for the respondents that at this stage petitioner is a mere tenderer, has acquired no vested right except that his bid is to be considered and the attempt made by the petitioner to challenge the decision of respondent no.1-Company to extend the deadline for submission of the bid is nothing but an attempt to throttle the competition and the action of the petitioner in litigating the matter at this stage is nothing but is clearly contrary to the observations of the Hon'ble Supreme Court in paragraph '38' in the case of **Caretel Infotech Ltd. (supra)** which reads as under:-

"38. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their



contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector.”

103. For the aforementioned reasons, this Court finds no merit in the writ application. It is dismissed accordingly. There would however be no orders as to costs.

(Rajeev Ranjan Prasad, J)

arvind/-

AFR/NAFR	AFR
CAV DATE	19.04.2019
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