

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.6426 OF 2019

M/s Yogiraj Powertech Pvt.Ltd.,
Groma House,"B"wing, 2nd Floor,
Office No.7/8/9 and 10, Plot no.14-C,
Sector 19, Washi,
Navi Mumbai 400 705
through its Director,
ShriPrasanna Vinayak Date,
Age 47 years, R/o As above
... **Petitioner**

Versus

1. State of Maharashtra,
Through its Secretary,
Industries, Energy and
Labour Department,
Mantralaya, Mumbai
2. The Maharashtra Industrial
Development Corporation,
Through its Chief Executive Officer,
"Udyog Sarthi", Marol Industrial
Area, Mahakali Caves road,
Andheri (East), Mumbai 400 093
3. The Superintending Engineer,
Maharashtra Industrial Development
Corporation, E & M Circle,
Jog Center, 5th Floor,
Wakadewadi, Pune-3
4. Chief Engineer,
Maharashtra Industrial Development
Corporation, Station road,
Near Udyog Sadan Building,
Opposite to Ashok Vihar,
MIDC Area, Aurangabad,
Taluka and District Aurangabad ..

Respondents

Mr. S. G. Chapalgaonkar, Advocate for the
petitioners.

Mr. A. B. Chate, A.G.P. for the respondent No.1-
State

Mr. S.S.Dande, Advocate for respondent Nos. 2 to 5

**CORAM : S. V. GANGAPURWALA
AND
ANIL S. KILOR, JJ.**

RESERVED ON : 25th September, 2019

PRONOUNCED ON : 20th December, 2019

JUDGMENT (Per Anil S. Kilor, J.)

1. Rule. Rule made returnable forthwith. By consent of the parties, the petition is taken up for final disposal.

2. The petitioner who had participated in a tender process relating to work of providing, installing, commissioning and testing of pumping machinery for Chikalthana feeder at Water Treatment Plant (WTP), Waluj, Aurangabad, was declared disqualified, the said disqualification is under challenge in the present petition.

3. Brief facts leading to the present petition are, that the MIDC has developed Industrial areas around Aurangabad city and to provide water supply to these Industrial areas, the MIDC has commissioned one 72 MLD Centralised water supply scheme at Waluj MIDC. The scheme has Raw water

works/ jack well located at Brahmagavan and WTP at Waluj MIDC. From pump house at WTP Waluj, pure water is pumped to various Industrial areas through various feeders.

4. The MIDC has provided 3x350 HP pumps for pumping pure water to Aurangabad, Chikalthana and Shendra Industrial areas. Due to the increased water demand, on the said feeder, the MIDC has proposed replacement of old machinery with new pumping machinery.

5. In order to execute the work, tenders were invited from eligible bidders. The scope of work includes providing, installing, commissioning and testing of pumping machinery for Chikalthana feeder at WTP, Waluj.

6. The petitioner being interested and claiming to be qualified in all respect, filled in tender form along with requisite documents.

7. Other than the petitioner four more bidders had submitted their respective tenders. In technical bid the petitioner was declared disqualified on the ground that the petitioner company had not

submitted the bid capacity as certified by Chartered Accountant and the Technical Data Sheet was not as per the Notice Inviting Tender (NIT).

8. Out of the total five bidders including the petitioner, three bidders were considered as qualified. The legality and correctness of the disqualification of the petitioner is called in question by the present petition.

9. Heard the learned counsel Shri Chapalgaonkar for the petitioner, Shri Chate for State and Shri Dande for respondent Nos. 2 to 5 MIDC and concerned authorities.

10. Shri Chapalgaonkar, learned counsel for the petitioner submits that as far as the first ground of disqualification, that the petitioner company had not submitted the bid capacity as certified by Chartered Accountant, is concerned it is necessary to point out that, in Notice Inviting Tender no such requirement of certification of bid capacity by Chartered Accountant was prescribed.

11. He submits that the petitioner company has submitted the requisite documents indicating the bid

capacity of the petitioner. According to the learned counsel for the petitioner the condition of certification of such document from Chartered Accountant is not the part and parcel of tender notice. The required document is only the certificate from Engineer/ In charge.

12. Shri Chapalgaonkar, learned counsel for petitioner further argues that as far as the second ground for disqualification that Technical Data Sheet is not as per the Notice Inviting Tender, is concerned, in the original notice inviting tender there was no such clause or requirement of technical data to be submitted in any particular format. He draws our attention to the fact that subsequently tender notice was amended and this condition has been incorporated which reads thus:

“All technical documents for pumps, motors, all required pump curves etc. to be submitted in envelop no. 1 and needs to be duly stamped signed from the manufacturers only”

According to the learned counsel for the petitioner, even reading of the amended clause will itself make it clear that, such information need not be in any prescribed/ particular format.

13. He submits that the petitioner company had submitted all technical documents for pumps, motors, all required pump curves, etc. in envelop no. 1. He has invited our attention to the fact that all these documents are duly stamped and signed by manufacturer and as such the petitioner company has complied with the condition as prescribed by the said amendment.

14. The learned counsel for the petitioner Shri Chapalgaonkar urges that the purpose of incorporation of amendment and putting additional requirement of technical data to be stamped and signed by the manufacturer is only to ensure that the pump sets, motors and machinery of required standard and technical specifications as prescribed to meet the requirements of work is used. He submits that as the intention behind putting the said condition is met by the documents submitted by the petitioner in envelop no. 1, disqualification of the petitioner on the said ground is illegal.

15. Shri Chapalgaonkar, has drawn our attention to the guidelines for the procedure to be adopted at the time of opening of a tender.

According to him fair play is expected on the part of tender issuing authority. He submits that on minor and flimsy grounds the bidder shall not be disqualified.

16. Per contra Shri Dande, learned counsel for the tender issuing authority MIDC, supports the decision of the respondent authority. He points out that the notice inviting tender clearly specifies the manner in which the interested bidders are expected to submit their bids. He further submits that the tender notice also contained list of documents required and a format of specifications/ parameters of Motor and Pumps to be supplied by interested bidders.

17. Shri Dande relied upon a judgment of the Hon'ble Supreme Court of India in the case of **Tejas Construction -Vs- Municipal Council (2012) 6 SCC 464**, to submit that in absence of any malafide or arbitrariness in process of evaluation of bids and determination of eligibility of bidders, the Court should not interfere.

18. He further placed reliance on a judgment of

the Hon'ble Supreme Court of India in the case of **Elektron Lighting System -vs- Shah Investments (2015) 15 SCC 137**, to urge that 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.

19. Shri Dande then pointed out that in the case of **Bakshi Security -vs-Devkishan Computer (2016)8 SCC 446**, the Hon'ble Supreme Court of India has held that the essential condition of a tender has to be strictly complied with.

20. He also relied on the judgment of the Hon'ble Supreme Court of India in the case of **Siemens Public Communication -vs- Union of India (2008) 16 SCC 215**, to argue that by way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. The Court has inherent limitation on the scope of any such enquiry.

21. To consider and appreciate the rival contentions of the parties we have gone through the record of the petition and various judgments.

22. The limited question that arises and needs to be considered in this writ petition filed by the unsuccessful tenderer is, whether the MIDC acted unreasonably in disqualifying the petitioner.

23. In the case of **Tata Cellular vs. Union of India, reported in (1994) 6 SCC 651**, the Hon'ble Supreme Court of India has held that the judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the court cannot substitute its own decision. Apart from the fact the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a judge to act as a super-board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

24. The Supreme Court of India in the case of

Central Coalfields -vs- SLL-SML (2016) 8 SCC 622,
 had an occasion to consider 'essential term' of
 tender notice and effect of its non compliance. The
 Hon'ble Supreme Court has observed thus:

39. *Poddar Steel* was a rather interesting case and added a new dimension to the discourse. The decision of the Allahabad High Court records that the relevant clause in NIT gave the bidder the option of depositing the earnest money in cash or by a "demand draft drawn on DLW Branch of SBI in favour of Assistant Chief Cashier, DLW Varanasi". As many as 21 parties had responded to NIT, but 8 of them had not deposited any earnest money at all and the remaining 13 bidders had "deposited the earnest money by one mode or the other but not necessarily in the manner provided in NIT except perhaps a few". The Tender Committee deviated from the terms of NIT and considered the bids of these 13 bidders and accepted the bid of Poddar Steel, who had given the earnest money not by cash or a demand draft but by "a loose cheque drawn on its C/D account in Union Bank of India, Sonarpura, Varanasi". On the issue of discriminatory treatment, the contention of the employer was that since all the 13 bidders who had made the earnest money deposit were treated equally, there was no issue of any discriminatory treatment.

40. However, the High Court took the view, following *Ramana Dayaram Shetty* and the privilege-of-participation principle, that it was possible that if those who did not deposit any earnest money had known that a crossed cheque (drawn on a bank other than SBI) towards earnest money was acceptable to the employer, they too could have been in the fray. Under these circumstances, the High Court held that excluding them from competition, through

this unannounced deviation affecting bidders and potential bidders alike, rendered the bidding process unfair. The High Court introduced an "essential term" concept and held that the clause in NIT relating to deposit of earnest money was an essential term thereof and could not be deviated from. The Allahabad High Court held : (*Ganesh Engg. Works case*, SCC OnLine All para 24)

"24. The mere fact that all the tenderers who had deposited the earnest money, whether in terms of Clause 6 or not had been treated alike cannot make any different. It is quite possible to visualise that the parties who had failed to deposit the earnest money may also have been in the fray and they known to deposit the earnest money may also have been in the fray had they known that earnest money through cheque was also acceptable. Thus, they have obviously been deprived from competing with others and this makes the action of Respondents 1 to 5 unfair when Condition 6 of NIT so specifically points out that deposit of earnest money in any other mode except in cash or by demand draft would not be acceptable. It leads us to think that this was an essential precondition for submitting tenders and the respondents were not entitled to deviate from this. All tenders which were not accompanied by deposit of earnest money strictly in the manner indicated in NIT deserved to be rejected. We reject the contention of the respondents that the earnest money could be accepted even when it was deposited by some mode other than those in NIT. We also hold that Clause 6 of NIT is not merely ancillary or subordinate condition but in view of the language in which it is couched the same was a crucial and essential term of the tender which could not be deviated from."

25. The Hon'ble Supreme Court of India in the case

of **Maa Binda Express Carrier and anr. Vs. North-East Frontier Railway and another** (2014) 3 SCC 760, while dealing with the scope of judicial review in matters relating to award of contracts by the State and its instrumentalities, held as follows:

8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

26. The Hon'ble Supreme Court of India in the

matter of **Uttar Pradesh Avas Evam Vikas Parishad and ors.-Vs.- Om Prakash Sharma** ,(2013) 5 SCC 182, considered the rights of the tenderer and held thus:

29. This Court in *Meerut Development Authority case* has laid down the legal principle that the bidder who has participated in tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. The relevant paragraphs are extracted hereunder: (SCC p. 182, paras 27 & 29)

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."

27. The Hon'ble Supreme Court of India in the matter of **Siemens Aktiengesellschaft & Siemens Ltd. v. DMRC Ltd.**, (Supra) observed thus :

32. Reference may also be made to the decision of this Court in *N.D. Jayal v. Union of India* wherein this Court observed:

"20. This Court cannot sit in judgment over the

cutting edge of scientific analysis relating to the safety of any project. Experts in science may themselves differ in their opinions while taking decisions on matters related to safety and allied aspects. The opposing viewpoints of the experts will also have to be given due consideration after full application of mind. When the Government or the authorities concerned after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere."

28. The Hon'ble Supreme Court of India in the case of **Food Corporation of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71**, took note of the necessity to consider and give due weight to the reasonable or legitimate expectations of the person likely to be affected in contractual sphere and held thus :

7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected

by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

29. In the case of **Ratnagiri Gas and Power (P) Ltd.**

v. RDS Projects Ltd., (2013) 1 SCC 524, the Hon'ble

Supreme Court has held thus :

38. We need hardly point out that in cases where the decision-making process is multi-layered, officers associated with the process are

free and indeed expected to take views on various issues according to their individual perceptions. They may in doing so at times strike discordant notes, but that is but natural and indeed welcome for it is only by independent deliberation, that all possible facets of an issue are unfolded and addressed and a decision that is most appropriate under the circumstances shaped. If every step in the decision-making process is viewed with suspicion the integrity of the entire process shall be jeopardised. Officers taking views in the decision-making process will feel handicapped in expressing their opinions freely and frankly for fear of being seen to be doing so for mala fide reasons which would in turn affect public interest.

30. In the matter of **Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa**, (Supra), the Hon'ble Supreme Court of India has held thus :

20. In *Air India Ltd. v. Cochin International Airport Ltd.*⁷ this Court held that the award of contract was essential in commercial transactions which involves commercial consideration and results in commercial decision. While taking such decision the State can choose its own method on terms of invitation to tender and enter into negotiations. The following passage from the decision is apposite: (SCC pp. 623-24, para 7)

"7. ... The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for

bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. ... 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."

21. To the same effect is the decision of this Court in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*⁸ and *Jagdish Mandal v. State of Orissa*⁹ where this Court laid down the following tests for judicial interference in exercise of power of judicial review of administrative action: (*Jagdish Mandal case*⁹, SCC p. 531, para 22)

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

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

OR

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

(ii) Whether public interest is affected.

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

31. In the case of **Bakshi Security -vs- Devkishan (Supra)**, the Hon'ble Supreme Court of India considered the essential conditions of the tender and held thus:

14. The law is settled that an essential condition of a tender has to be strictly complied with. In *Poddar Steel Corpn. v. Ganesh Engg. Works* this Court held as under: (SCC p. 276, para 6)

"6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. Similarly in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* this Court held as under: (SCC pp. 571-72, para 66)

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly

when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;..."

32. This Court in the matter of Agni Aero Sports -vs- Indian Institute, 2010(40 All MR 506, has observed thus:

45. Before we consider the issue on merit, it will be appropriate to consider the law declared by the apex Court on the subject. It is well-settled that while exercising power of judicial review in respect of the contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the decision making process, and can certainly examine whether the decision making process was rational, not arbitrary and violative of Article 14 of the Constitution Sterling Computers Ltd. v. M and N Publications Ltd. MANU/SC/0439/1993MANU/SC/0439/1993 : (1993) 1 SCC 445. Similarly, the apex Court in the case of Tata Cellular v. Union of India (UOI) MANU/ SC/0002/ 1996MANU/ SC/0002 /1996 : (1994) 6 SCC 651 has given the limitations relating to the scope of judicial review of administrative decisions. Those are (i) the modern trend points to judicial restraint in administrative action; (ii) the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made;

(iii) the Court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible; (iv) the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract; (v) the Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by mala fides; and (vi) quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted experience.

46. The apex Court in the case of Raunaq International Ltd. v. I.V.R. Construction Ltd. MANU /SC/0770/ 1998 MANU /SC/0770/1998 : (1999) 1 SCC 492 has observed that 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. The apex Court has given some of the relevant considerations. Those are: (i) the price at which the other side is willing to do the work; (ii) whether the goods or services offered are of the requisite specifications; (iii) 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 fulfill the requirements of the job is also important; (iv) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (v) past experience of the tenderer, and whether he has successfully completed similar

work earlier; (vi) time which will be taken to deliver the goods or services; and (vii) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

33. This Court further in the matter of K. K. Vidyut -vs- The Union Of India 2016(6) ALLMR 21, has held thus:

14. The law with regard to interference by this Court in contractual matters is very well crystallized in the case of Tata Cellular v. Union of India, reported in MANU /SC/ 0002/ 1996 MANU/SC/0002/1996 : (1994) 6 SCC 651. Paragraph 77 of the said judgment reads thus,

"77. The duty of the court is to confine itself to the question of legality. Its concern should be:

- 1. Whether a decision-making authority exceeded its powers?*
- 2. Committed an error of law,*
- 3. committed a breach of the rules of natural justice,*
- 4. reached a decision which no reasonable tribunal would have reached or,*
- 5. abused its powers.*

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

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind 28, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

It could thus be seen that the scope of judicial interference in contractual matters is very limited. Unless the Court comes to a conclusion that the decision maker has not understood the law correctly that regulates his decision-making power it or when it is found that the decision of the decision maker is vitiated by irrationality and that too on the principle of 'Wednesbury Unreasonableness' or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for this Court to interfere in the decision-making process. It is also equally well settled that it is not permissible for the Court to examine the validity of the decision but this Court can examine only the correctness of the decision making process. In the present case, we find that the respondents had rightly taking into consideration, sub-clauses (c) and (e) of Clause 6 have found that the petitioner had failed to submit the necessary documents and, therefore, rightly rejected its technical bid. The decision of the respondents also cannot be said to be vitiated on the ground of mala fide action, inasmuch as even after rejection of the bid of the petitioner and one another bidder,

there were six bidders in the fray.

34. Thus from the judgments *supra*, it is clear that the scope of judicial review is very limited in matters relating to award of contracts by the State and its instrumentalities. Judicial review is not an appeal from the decision, the court cannot substitute its own decision and the court is hardly equipped to do so, it would not be desirable either. It is not the function of a judge to act as a super-board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. Unless the court comes to a conclusion that the decision maker has not understood the law correctly that regulates his decision making power or when it is found that the decision of the decision maker is vitiated by irrationality and that too on the principle of 'Wednesbury Unreasonableness' or unless it is found that there has been a procedural impropriety in the decision making process, it would not be permissible for court to interfere in the decision making process.

35. It is also equally well settled law that it is permissible for the Court to examine only the correctness of the decision making process and not

the validity of the decision. 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 for making out a legal point. The court should always keep the larger public interest in mind in order to decide whether intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene. When the Government or the authorities concerned, after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere. Ordinarily soundness of the decision ought not be questioned but the decision making process certainly be subject to judicial review.

36. It is fairly well settled that the award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. The party issuing the tender can fix the value and its own terms of invitation to tender and

has the right to punctiliously and rigidly enforce the terms of the tender. In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. The Court cannot make distinction between essential and non essential terms contrary to the intention of the tender issuing authority and thereby rewrite the arrangement. The terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers.

37. The authority issuing tender is bound to adhere to the essential terms, norms, standards and procedures laid down by it and cannot depart or deviate from them arbitrarily. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some. The tender issuing authority could deviate from the terms and conditions of the tender if the changes affected all intending applicants alike and were not objectionable and so long as the 'level playing field' is maintained and it does not result in

any arbitrariness or discrimination. The authority is also free to grant any relaxation, for bona fide reasons and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

38. Submission of a tender in response to a notice inviting such tenders is no more than making an offer. The State or its agencies are under no obligation to accept and the bidders participating in the tender process cannot insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon the contract. All that the participant bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. Where selection or rejection is arbitrary, certainly the court would interfere.

39. In this case the petitioner's disqualification is on the grounds that-

- A. Technical data sheet is not as per NIT. and
- B. Has not submitted the bid capacity certified by C.A.

Thus to consider the correctness of the above

referred grounds of disqualification, it would be necessary to refer to the relevant conditions of the tender, which are as follows.

Important Note :

A. The information regarding the tender and facility to download it, will be available on MIDC E-tendering portal on Website www.midcindia.org. The downloaded and duly completed tender form shall be submitted (by eligible contractors only) without making any change in the script of tender document. If after submission of tender, it is noticed that the tender script is modified in any manner whatsoever, the tender will be summarily rejected. (page 4 of tender notice)

Important conditions:

Condition Nos. 1 and 2

1. The submission of tender shall be done in the manner prescribed by MIDC only.
2. If the contents of Envelope no.1 are not found as per the requirement of MIDC, the Envelope no.2 will not be opened at all and the tender shall be summarily rejected. (Page no. 5 Of tender notice)

At page 7 of the tender document it is specifically mentioned that :

All the technical documents for pumps, motors, all required pump curves etc. To be submitted in envelop no. 1 and needs to be duly stamped and signed from the manufacturers only.

Tenderers are requested to note this mandatory condition scrupulously, failing which price bid shall not be opened and tender will be rejected out rightly.

40. In this regard it is the submission of Shri Dande, learned counsel for the MIDC that the

requirement of submission of required information in a given format and certification by manufacturer is an essential term of tender, considering the fact that pumps are needed to be of a specific make and of a fixed standard. The bidder, therefor, was required to submit information relating to pumps in a given format which contains 28 parameters. All the parameters have its own importance and significance in evaluation of bids. According to learned counsel for MIDC the requirement of uploading the data sheet for Pump in a given format without changing the script is mainly to evaluate and compare all the received bids in terms of required specifications/ parameters of pump. Moreover to verify authenticity of information submitted, certification of it by the manufacturer is must. It is therefore according to him that change in script of format is not permissible and any deviation would result in rejection of tender.

41. In the present matter there is no dispute about the fact that the petitioner has not submitted the data sheet of pump as per NIT in a given format. According to the petitioner, though the information was not submitted in the given format but necessary

information relating to all parameters was submitted and therefore, according to the learned counsel for the petitioner such deviation would not disqualify the petitioner.

42. We don't find favour with the said argument of the petitioner as we are of the considered view that as pointed out by the respondent MIDC that there was a specific purpose behind calling the relevant and necessary information of pumps in a given format with certification of the manufacturers. The learned counsel for MIDC has made clear the object and purpose of having such condition and importance of it in the process of evaluation of bids, as referred above.

43. In the present matter there was a specific condition in the tender notice that all the technical documents for pumps, motors, all required pump curves etc. are to be submitted in envelop no. 1 and needs to be duly stamped and signed from the manufacturers only. It is clear from the tender notice that the tenderers were requested to note the said mandatory condition scrupulously, failing which price bid shall not be opened and tender will be rejected

out rightly. However the petitioner materially changed the script and submitted the information in modified script and not submitted in a given format as per necessary term of the tender.

44. The technical data sheet with required parameters was enclosed with the NIT and it was uploaded. The technical data is hardcore part of an information to evaluate the technical standards. In turn, the techno commercial offer shall be evaluated. Thus, we are satisfied that there was a valid reason for putting the said condition of having data sheet of pumps in a given format. In the circumstances, this court cannot hold that the said condition was not necessary condition or this court also cannot relax the said condition for the petitioner in view of the limited scope of judicial review referred above, in the matters of tenders.

45. In the said backdrop of above referred facts and well settled law, if we consider that the party issuing tender can fix its own terms and has the right to punctiliously and rigidly enforce the terms of the tender, and the Court cannot make distinction between essential and non essential terms contrary

to the intention of the tender issuing authority and thereby rewrite the arrangement, we do not find any illegality in insistence of MIDC for strict compliance of necessary terms of tender and on deviation by the petitioner, declaring the petitioner disqualified. Hence we reject the arguments of the petitioner that even though the information was not submitted in a given format but the required information was submitted and therefore the purpose of calling the said information is fulfilled.

46. It is a trite law that the goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some. The tender issuing authority could deviate from the terms and conditions of the tender if the changes affected all intending applicants alike and were not objectionable and so long as the 'level playing field' is maintained and it does not result in any arbitrariness or discrimination. In the backdrop of said well settled law position if this court permits any deviation from complying the said necessary term, this unannounced deviation would render the bidding process unfair because it is quite possible

that there may be bidders who have not participated in the tender process as they were not in position to make strict compliance of the said condition.

47. This Court vide order dated 6.8.2019 appointed a Court Commissioner to report whether the documents from Pages 532 to 535 of the Writ Petition were in the envelop-1. Accordingly, the Court Commissioner Shri Subodh S. Shah submitted his report on 9.8.2019. However in view of the fact that the petitioner failed to submit data sheet of pumps in a given format which was the necessary condition we are not inclined to go into the findings of the report in view of observations made herein above about the strict compliance of necessary terms and in view of the settled law that no deviation is permissible.

48. So far as the requirement of submission of bid capacity certified by Chartered Accountant, at page No.37 of the tender notice there was specific condition which reads thus:

“Attached Certificate(s) from Chartered Accountant”

1.4 : Information of bid capacity (works for

which the bids have been submitted and the works which are yet to be completed) as on date of this bid.

49. The petitioner has submitted documents duly certified by the Chartered Accountant except the bid capacity document and particularly the documents relating to the cash in hand. The respondent MIDC has pointed out that other qualified bidders have strictly complied with the said conditions, however the petitioner has failed to comply with the said conditions. As observed hereinabove, that it is a settled law, that the deviation from the necessary condition is not permissible. Thus, on this count too we don't find any merit in the case of the petitioner and therefore, we hold that the ground namely that the petitioner has not submitted the bid capacity certified by the chartered accountant , is as per the conditions of the tender and no illegality has been committed by the respondent MIDC in disqualifying the petitioner on the said ground.

50. As observed by us that it is not permissible for this court to examine the validity of the decision

but to examine only the correctness of the decision making process. Moreover award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. The scope of judicial review is very limited in matters relating to award of contracts by the State and its instrumentalities. Thus in absence of any material on record to demonstrate that the impugned decision is arbitrary or mala fide or irrational we are not inclined to interfere in the present matter.

51. Hence accordingly the petition is dismissed. Interim relief granted stands vacated. Rule discharged.

(ANIL S. KILOR, J.) (S.V.GANGAPURWALA, J.)

JPC