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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 09.12.2019

+ W.P.(C) 13793/2018 and C.M. No.53846/2018

PARAMOUNT WIRES AND CABLES LTD Petitioner

Through: Mr. Rakesh Sachdeva,
Advocate.

versus

INDIAN OIL CORPORATION LTD. & ORS..... Respondents

Through: Mr. V.N. Koura, Advocate with
Mr. S. Sirish Kumar, Advocate
for respondent No.1.
Mr. Rohan Anand, Advocate
for respondent Nos.2 to 4.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

1. With the consent of the parties, the present writ petition is set-down for final hearing and disposal at the admission stage itself.
2. The petitioner is a Micro Small and Medium Enterprises ('MSME') company. Respondent No.1 had invited tender No. PLCC/PHB-PHD-KASPL/TI/18037 dated June 16, 2018 and tender No. PLCC/PRRPL/TI/18004 dated January 29, 2018. Rejection of the technical bids of the petitioner by orders dated 13.12.2018 and 15.06.2018 has led to filing of the present writ petition. The reasons

for rejection have been informed to the petitioner by communication dated 13.12.2018, the operative part of which reads as under:-

“ You are informed that your bid for the above tender has been rejected during Technical evaluation by the duly constituted committee for the reason Techno commercially not acceptable.”

Second tender of the petitioner was also rejected on the ground that the partner of the petitioner was not technically qualified for the tender.

3. Common grounds have been raised and identical arguments have been made by the learned counsel for the petitioner in respect of both tenders. It is submitted before us that the action of the respondents is arbitrary, illegal, fanciful and without any application of mind.

4. Counsel for the petitioner submits that orders of cancellation of technical bids are unfair and discriminatory ; and respondents have failed to comply with the terms and conditions for awarding of the tender. Counsel submits that the first tender was not awarded to the petitioner for the purported reason that the partner of the petitioner did not possess an experience certificate ; and the second reason cited, is that the respondents were not satisfied with the equipment which were to be supplied by the petitioner, which the respondents considered to be obsolete. As far as the second tender is concerned, the reasons for rejection are that the bid did not meet the “Criteria for Evaluation-Technical” as per clauses 7.5.0, 7.9.0 and 7.13.0 of “Special Instructions to Tenderers”, which clauses are verbatim the same,

except for a small difference in clause 7.9.0 (as underlined below) as applicable to different categories of bidders, and which read as under:

“7.5.0

Experience:

The bidder should have at least 1 (One) Proven Track Record (PTR) duly certified by owner of underground petroleum pipeline for Project Management, design, engineering, supply, configuration & testing of PIDWS EQUIPMENT with Graphics User Interface and necessary software for diagnostic & maintenance functions, wherein the work involves minimum integration of 2 nos. of geographically apart located PIDWS (laser unit/sensor unit) system with central location monitoring. The system must be deployed in any Cross country underground pipelines used for transportation of crude/gas/petroleum products. The system must be satisfactorily running for at least 6(six) months till start date of download of tender.

Geographically apart shall be treated as the system deployed at least 10 KM apart from each other. PIDWS equipment (single or dual channel) if working in two different geographical directions (east/west) from single installation, then these equipment shall be treated as 2 nos. of PIDWS equipment located geographically apart from each other.

*(Certificate to be submitted by bidder as per Proven Track Record (PTR) format in **Annexure-IIA** or a format covering same aspects). The bidder should provide completion & performance certificate, PO copies and reference/contact details of the client where the job has been performed and also confirm all the points in the **Annexure-IIB** (Technical form).*

The works completed during the last 7 (seven) years ending on start of download of tender shall only be considered."

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"7.9.0

Experience:

The bidder should have at least 1 (One) Proven Track Record (PTR) duly certified by owner of underground petroleum pipeline for Project Management, design, engineering, supply, configuration & testing of PIDWS EQUIPMENT with Graphics User Interface and necessary software for diagnostic & maintenance functions, wherein the work involves minimum integration of 2 nos. of PIDWS (laser unit/sensor unit)system with central location monitoring. The system must be deployed in any Cross country underground pipelines used for transportation of crude/gas/petroleum products. The system must be satisfactorily running for at least 6(six) months till start date of download of tender.

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*(Certificate to be submitted by bidder as per Proven Track Record (PTR) format in **Annexure-IIA** or a format covering same aspects). The bidder should*

*provide completion & performance certificate, PO copies and reference/contact details of the client where the job has been performed and also confirm all the points in the **Annexure-IIB** (Technical form).*

The works completed during the last 7 (seven) years ending on start of download of tender shall only be considered."

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xxx

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"7.13.0

Experience:

The bidder should have at least 1 (One) Proven Track Record (PTR) duly certified by owner of underground petroleum pipeline for Project Management, design, engineering, supply, configuration & testing of PIDWS EQUIPMENT with Graphics User Interface and necessary software for diagnostic & maintenance functions, wherein the work involves minimum integration of 2 nos. of geographically apart located PIDWS (laser unit/sensor unit) system with central location monitoring. The system must be deployed in any Cross country underground pipelines used for transportation of crude/gas/petroleum products. The system must be satisfactorily running for at least 6(six) months till start date of download of tender.

Geographically apart shall be treated as the system deployed at least 10 KM apart from each other. PIDWS equipment (single or dual channel) if working in two different geographical directions (east/west) from single installation, then these equipment shall be treated as 2 nos. of PIDWS equipment located geographically apart from each other.

*(Certificate to be submitted by bidder as per Proven Track Record (PTR) format in **Annexure-IIA** or a format covering same aspects). The bidder should provide completion & performance certificate, PO copies and reference/contact details of the client where the job has been performed and also confirm all the points in the **Annexure-IIB** (Technical form).*

The works completed during the last 7 (seven) years ending on start of download of tender shall only be considered."

5. He also submits that the petitioner has been successfully providing services to a sister concern of respondent No.1 being Hindustan Petroleum Corporation Limited ("HPCL"). Strong reliance is placed by the counsel for the petitioner on the Technical Experience Certificates issued by HPCL dated 19.03.2018 and 04.07.2018 in favour of the petitioner and it is contended that since the petitioner is successfully carrying-out work for HPCL, no other certificate was required. It is further contended that as far as the certificate dated 31.08.2017 issued by Motorola Solutions to the partner i.e. Future Fibre Technologies Pvt. Ltd. ('FFT') is concerned, the same has been filed. Thus, it is submitted that the rejection of the technical bid is unjust and unfair. He also submits that as far as the rejection of the second tender is concerned, a certificate has not been provided by the end-user for the equipment supplied ; and that should not be held against the petitioner. Reliance in this regard is placed upon a decision rendered in the case of *Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd.* reported as (1997) 1 SCC 738. Para 9 of this judgment is relied upon, which reads as under:-

“9. The Asian Development Bank came into existence under an Act called the Asian Development Act, 1966, in pursuance of an International agreement to which India was a signatory. This new financial institution was established for accelerating the economic development of Asia and the far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and Respondent 1 together with the consultant's opinion after the so-called corrections made the conclusion of the Bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring Court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly

when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant. In Tata Cellular v. Union of India this Court has held that :

"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 fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review 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, Wednesbury 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."

6. Thereafter, reliance is also placed on ***Gharda Chemicals Limited vs. Central Warehousing Corporation*** reported as 118 (2005) DLT 159 (DB). Para 13 of this judgment is relied upon, which reads as under:-

“13. It was said that though an executive authority must have certain measure of freedom of "play in the joints" to take a decision on the administrative side but still such a decision has to be free from arbitrariness, mala fides and "Wednesbury" unreasonableness. To elaborate as to what is meant by the principle of "Wednesbury" unreasonableness, the Court referred to the following principle summarised in Tower Hamlets London Borough Council v. Chetnik Developments Ltd., (1988) 1 All ER 961:

"The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere."

7. Mr. V.N. Koura, learned counsel for respondent No.1 has opposed this petition. He submits that the law with regard to dealing with tender matters under Article 226 of the Constitution of India is

well-settled. The court while exercising its power of judicial review is only to examine the decision making process and not the decision. To support his arguments, he relies on *Tata Cellular vs. Union of India* reported as (1994) 6 SCC 651 wherein it was held as under:-

“94. The principles deducible from the above are:

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

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

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

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

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

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

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

8. He further submits that the technical evaluation of the bid is in the hands of the user. Reliance is placed upon paras 38 and 44 of the judgment of Supreme Court dated 09.04.2019 arising out of SLP(C) No.46/2019 in ***Caretel Infotech Ltd. vs. Hindustan Petroleum Corporation Limited and Ors.***, reported as 2019 SCC Online SC 494, of which paras 40 and 44 read as under:-

“40. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of respondent No.1 must prevail. Respondent No.1 itself, appreciative of the wording of clause 20 and the format, has taken a considered view. Respondent No.3 cannot compel its own interpretation of the contract to be thrust on respondent No.1, or ask the Court to compel respondent No.1 to accept that interpretation. In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not acceptable to the Constitutional Court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under:

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender

documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

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“44. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts 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 the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit.”

9. He further places reliance upon ***Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Another*** reported as (2016) 16 SCC 818, more particularly paras 11, 15 and 16 which read as under :-

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In

other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

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“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

“16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.”

10. Counsel for respondent No.1 has also drawn attention of the court to the certificate filed by the petitioner. He submits that reading of this certificate makes it clear that it has not been issued by the end-user but has been issued by Motorola Solutions Colombia Ltd. He

submits that reading of the first paragraph of this certificate would show that the end-user was state-owned by oil company Ecopetrol. As far as the submission of counsel for the petitioner with regard to the petitioner successfully carrying-out work for HPCL is concerned, counsel for respondent No.1 submits that a query was raised in this regard with HPCL. The response received has been relied upon and the same is extracted hereunder:-

“Regret the typographical error in the email sent earlier. The clarification sought in your email is being addressed as under:

We would like to inform that the PO for PIDS system was placed on M/s Paramount Cable for Mangalore Hassan Mysore Solur LPG Pipeline for the section 0-82 Kms.

- 1. The System is installed and commissioned on 12/08/2017. However complete handling over is pending as integrating the system with SCADA is still in progress.*
- 2. The system is found to be satisfactory as far the generations of events and accuracy of the events etc.*
- 3. Performance of the contractor is also found to be satisfactory for execution of work under this contract*
- 4. Two Dual Channel controllers one each at Chainage 22.4 Km and one at 80 Km are positioned under the contract.*
- 5. The Dual Channel Controller at 22.4 Km is working in both the directions and one at 82 Kms is presently configured and working in one directions as the contract is for covering the scope of pipeline from 0-82 Kms only.*

The bill of material of the items installed is enclosed.

Thanks & regards,

*B. Ramesh
General Manager-Projects,
Pipeline Project Bangalore
Mobile: +91 95350 77800“*

11. Mr. Kaura has also drawn the attention of the court to the file noting of the technical committee in support of his submissions that respondent No.1 has acted in a fair and just manner and has carefully considered the material placed on record. Relevant portion of the report of the technical committee is extracted below:-

“Work order document no.16000056-OQ-12090/DPS dated 14.02.2017 and completion certificate dated 19.03.2018 issued by M/s Hindustan Petroleum Corporation Ltd for supply and installation Of OFC based Pipeline intrusion detection system for Mangalore Bangalore pipeline owned by HPCL.

b) Copy of purchase order no. NP5017628 dated 18.12.2009 issued by M/s Motorola to M/s FFT Australia, wherein supply of hardware, software can be established for pipe locator secure system.

c) Copy of purchase order no. NP4730046 dated 26.05.2009 issued by M/s Motorola to M/s FFT Australia, for supply of FFT custom 24 fiber SM loose tube 4 tight buffered secured pipe sensor cable.

From the submitted credentials followings are emerged:

a) As per tender BQC (technical), bidder should have experience of design, supply, installation and commissioning of Pipeline Intrusion detection system in underground Pipeline carrying petroleum product which should be certified by the owner of that Pipeline (mentioned in Annexure-II/IIA of the tender)

b) As per submitted Purchase order No. NP4730046 dated 26.05.2009 from M/s Motorola to M/s FFT, we can ascertain only supply of customized OFC cable by M/s FFT to M/s Motorola, which could not be considered to establish M/s FFT experience for design, supply, installation and commissioning of PIDWS in underground petroleum pipeline, as per tender BQC(technical). |

c) As per order No. NP5017628 dated 18.12.2009 issued by M/s Motorola to M/s FFT, it is established that the M/s FFT, Australia has only supplied hardware and software for intrusion detection System to M/s Motorola in year 2009, which was installed and commissioned by M/s Motorola for M/s Ecopetrol owned Pipeline in Colombia. Hence, we could not establish bidder's (M/s FFT, Australia) experience Of design, installation add commissioning of Intrusion detection system in underground petroleum pipeline.

d) Repeated queries were sought from the bidder to submit documentary evidence issued by the Pipeline owner to Certify successful design, supply, installation and commissioning of intrusion Detection system by the bidder (M/s FFT, Australia) in last seven years as per Annexure-II/IIA of the tender. In queries response, bidder shows his inability to provide documentary evidence from Pipeline owner for establishing experience of M/s FFT, Australia.

In view of above, we can conclude that even after repeated queries, bidder is unable to establish experience of M/s FFT, Australia duly certified by. Pipeline owner. Hence from the given credentials, M/s FFT (successor partner of consortium) is not meeting BQC (technical) of the tender.

12. As far as the submission of the experience certificate is concerned, Mr. Kaura has drawn the attention of the court to the format which we reproduce below:-

“ PROVEN TRACK RECORD (PTR) FORM

DATE:

To,

Indian Oil Corporation Ltd

Pipeline Division Head Office

Sub: - Performance Certificate for OFC based Pipeline Intrusion Detection & Warning (PIDWS) system

We hereby confirm that we have purchased Fiber Optic based Intrusion Detection and Warning System (PIDWS)/Pipeline Condition Monitoring & Surveillance (PCMS)) or similar system from M/s_____. This System is installed for _____ Km of Pipelines having_____nos. of sensor unit/laser unit which are located_____ km geographically from each other and integrated at central location for monitoring.

This PIDWS System was installed & commissioned by M/s_____on_____ & the performance of the above system is found satisfactory.

Yours truly,

*Authorized Signatory
(with Company Seal)*

Note:

The above form should be filled by the end user of PIDWS/ system on the letter head of end user company. Similar completed works means Project Management, design, engineering, supply, configuration & testing of

PCMS/PIDWS Equipment with Graphics User interface and necessary software for diagnostic & maintenance functions for Cross country underground pipelines used for transportation of crude/gas/petroleum products.”

13. He submits that the format makes it clear that this certificate is to be issued by the end-user ; and that there is no dispute that in this case, such certificate had not been issued by the end-user.

14. As far as the second tender is concerned, reliance is placed on relevant portion of technical evaluation note dated 03.12.2018 which is reproduced below:-

*“d) Certificate dated 26.04.2018 issued by M/s Motorola Solutions Columbia Ltd, wherein it is declared that M/s FFT Australia was involved in design, instillation works for Pipeline intrusion detection system for Pozoz Colorados Galan Oil & Gas pipeline
From the submitted credentials followings are to be noted:*

As per tender BQC (technical), bidder should have experience of design, supply installation and commissioning of Pipeline intrusion detection system in underground Pipeline carrying petroleum product which should be certified by the owner of that Pipeline (mentioned in Annexure-2A of the tender)

All the above documentary evidence are given by M/s Motorola who is not the pipeline owner, hence these credentials could not be considered for evaluation against Bidder's Qualification criteria (technical) as per tender.

Clarification was sought vide TQ-1 from the bidder to submit documentary evidence issued by the Pipeline owner to certify successful design, supply, and installation and commissioning of intrusion Detection

system by the bidder (M/s FFT, Australia) in last seven years as per Annexure-2A of SIT (Technical) of the tender.

In response to TQ-1, bidder has shown its inability to submit any documentary evidence issued by the Pipeline owner to certify successful design, supply, and installation and commissioning of Intrusion Detection system by the bidder (M/s FFT, Australia) in last seven years as per Annexure-2A of SIT (Technical) of the tender.

In response to TQ-1, bidder has drawn its inability to submit any documentary evidence issued by the Pipeline owner to certify successful design, supply, and installation and commissioning of intrusion Detection system by the bidder (M/s FFT, Australia) in last seven years as per Annexure-2A of SIT (Technical) of the tender.

In view of this, another TQ was raised to the bidder to establish BQC (technical) of M/s FFT Australia (member of Consortium) with documentary evidence. However, in response to TQ-2, bidder has again shown its inability to submit documentary evidence as per Annexure-2A of SIT (Technical) of the tender.

Repeated queries were sought from the bidder to submit documentary evidence issued by the Pipeline owner to certify successful design, supply, installation and commissioning of Intrusion Detection system by the bidder (M/s FFT, Australia) in last seven years as per Annexure-II /IIA of the tender. In response to repeated queries, bidder shows its inability to provide documentary evidence from Pipeline owner for establishing experience of M/s FFT, Australia.

In view of the above, we can conclude that even after repeated queries, bidder is unable to establish experience of M/s FFT, Australia duly certified by Pipeline owner. Hence from the given credentials, M/s FFT (successor partner/member of consortium) is not meeting BQC (technical) of the tender.”

15. We have heard learned counsel for the parties, given our thoughtful consideration to the matter and have examined the material on record. We have extracted in detail the minutes of the meeting where the technical bids of the petitioner were examined and evaluated with respect to both tenders. Minutes of the meeting show that in the first tender, the petitioner as also its partner were disqualified ; and in the second tender the partner of the petitioner was disqualified for the reasons as recorded in the minutes. Once respondent No.1 has cited the terms of the tender and then given reasons why such terms were not being met by the petitioner and/or its partner, then, it cannot be said that action of the respondents is either arbitrary, fanciful or illegal. This court is accordingly unable to agree with the submissions of learned counsel for the petitioner since we do not find that the decision making authority has committed any error of law or exceeded its power. It also cannot be said that the decision rendered is such, which no reasonable person would have reached.

16. We therefore find no merit in the petition ; and the same is dismissed.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 09, 2019

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