AFR

IN THE HIGH COURT OF JUDICATURE FOR ORISSA
AT CUTTACK

Writ Petition (Civil) No.16516 of 2020

M/s. Millennium Suppliers Pvt. Ltd. & Another … **Petitioners**

-Versus-

Mahanadi Coalfields Ltd. & Others … **Opposite Parties**

And

Writ Petition (Civil) No.17676 of 2020

M/s. KIPL-PNMPL JV … **Petitioner**

-Versus-

Mahanadi Coalfields Ltd. & Others … **Opposite Parties**

Advocate(s) who appeared in W.P.(C) No.16516/ 2020 by Video Conferencing mode :-

For Petitioner(s) : M/s. Gouri Mohan Rath, A.P. Rath, S.S. Padhy & P. Rath.
Mr. Ashok Mohanty, Sr. Advocate.

For Opposite Party(s) : M/s. Rakesh Sharma, P.R. Patnaik, R.K. Ray, S.N. Barik and K.P. Mukhi (for Opp. Parties 1 and 2).
Mr. B.P. Das (for Opp. Party No.3)

Advocate(s) who appeared in W.P.(C) No.17676/ 2020 by Video Conferencing mode :-

For Petitioner(s) : M/s. Debendra Kumar Dwibedi, S. Dwibedi, S. Das, D. Sethy & P. Behera.

For Opposite Party(s) : Mr. Rakesh Sharma, P.R. Patnaik, R.K. Ray, S.N. Barik and K.P. Mukhi (for Opp. Parties 1 and 2).
Mr. B.P. Das (for Opp. Party No.3)

Date of Hearing : 11.11.2020 Date of Judgment : 22.12.2020

HONOURABLE THE CHIEF JUSTICE MR. MOHAMMAD RAFIQ
AND
HONURABLE MR. JUSTICE C.R. DASH

J U D G M E N T

Per : Justice C.R. Dash.

1. Both the Writ Petitions relate to selfsame e-Tender Call Notice, i.e. Notice Inviting Tender ("NIT" for short). Therefore, both the cases are taken up together for disposal by this common judgment.

2. The bids of the Petitioners in both the Writ Petitions having been rejected during technical evaluation, the Petitioners in their respective Writ Petitions have assailed such decision of the authority concerned in the Tender process.

❖ **Facts common to both the Writ Petitions :-**

3. Opposite Party No.2 on behalf of Opposite Party No.1 floated e-Tender Notice vide NIT No.805/2020/185 dated 26.05.2020 for Mechanical Transfer of Coal / Coal Measure Strata into Tipping Trucks by Pay-Loaders and transportation of the same to Pit Head Stock / Sardega Railway Siding Nos. 1 & 2 / Reject Dump Yard as per the requirement, from Departmental Surface Miner Face to Garjanbahal OCP, Basundhara Area, MCL, for a quantity of 226,00,000 Te of Coal and 82,95,420 Te of Rejects.

3.1 The Petitioners in both the Writ Petitions along with private Opposite Party Nos.3 to 6 in these Writ Petitions submitted their respective bids pursuant to the aforementioned NIT. After submission of bids, the Technical Bids of the bidders were opened and during the technical evaluation, it was seen that certain clarifications were required from the Petitioners in both the Writ Petitions, and accordingly the evaluators of the NIT on 26.06.2020 uploaded online seeking clarifications from the Petitioners.

3.2 During the Technical Evaluation, the bid of the Petitioner in W.P. (C) No.16516 of 2020 was rejected on the following grounds :-

(i) Digital Signature Certificate ('DSC' for short) Authorization at the time of bid is not available ;

(ii) The Power of Attorney was executed on 26.06.2020, whereas the bid submission date was 16.06.2020.

So far as the Petitioner in W.P. (C) No.17676 of 2020 is concerned, its Technical Bid was rejected on the ground of inadequate Work Experience. It is worthwhile to mention here that the total Work Experience Value certified in favour of the Petitioner Company comes to Rs.7,50,14,129/- as against the required experience value of Rs.36,52,65,140/-.

The bid of the Petitioners having been rejected on the ground as aforesaid during Technical Evaluation, they have preferred these Writ Petitions for issuance of mandamus directing Opposite Party Nos.1 and 2 to allow them to participate in the Financial Bid.

❖ **Facts peculiar / relevant to W.P. (C) No.16516 of 2020**

4. The Evaluator of the NIT, during technical evaluation on 26.06.2020 uploaded online seeking clarification from the Petitioner as per Annexure-4 to the Writ Petition. One of the clarifications which was asked by Opposite Parties 1 and 2 in the clarification uploaded on 26.06.2020 (Annexure-4) is that, in the Affidavit dated 10.06.2020 which has been uploaded by the Petitioner along with its bid, it is not specified or mentioned regarding the authorization to use DSC of Petitioner No.2 on behalf of the bidding Company, i.e. Petitioner No.1. The discrepancy, as pointed out by

Opposite Party Nos.1 and 2 during the Technical Evaluation, is stated to be contravening Clause 14 (5) of the NIT.

4.1 The Petitioners' case is that, Mr. Kamalpat Dalmia (Petitioner No.2) is the Director of the Bidder Company – Petitioner No.1 and he had been duly authorized by Resolution of the Board of Directors dated 05.06.2020 to sign and submit the bid on behalf of the Company. Accordingly, Petitioner No.2 had submitted bid by using his Digital Signature Certificate. Further it is the case of the Petitioners that, the Central Public Procurement Portal of the Govt. of India has clarified that DSC is not required by Companies in its own name in case of e-Tender. Under such circumstances it is argued by Mr. Ashok Mohanty, learned Senior Counsel that there is no infirmity in the bid submitted by the Petitioner and, as such, rejection of the bid of the Petitioner on the ground of contravening Clause 14 (5) of the NIT is illegal, arbitrary and a fragrant defect in the Tender Process.

4.2 In the counter affidavit filed by Opposite Party Nos.1 and 2 dated 04.08.2020, the decision of the Technical Evaluation Committee in rejecting the bid of the Petitioners has been supported on the following grounds :-

(i) Petitioner No.2 being not the bidder himself and he having participated in the bidding on behalf of Petitioner No.1 Company, it was incumbent on him to have an Authorization / Power of Attorney from the Company to use his DSC for bidding as per Clause 14 (5) of the NIT.

(ii) The Power of Attorney by Petitioner No.1 Company to use the DSC submitted by Petitioner No.2 pursuant to Clarification dated 26.06.2020 by Opposite Party Nos.1 and 2 having been

executed on 26.06.2020, the last date of submission of bid being 16.06.2020, rejection of the bid on the ground of non-availability of DSC Authorization at the time of bid is just and proper.

4.3 On the face of rival contentions of the parties, the issue that arises for determination is, whether rejection of the bid of the petitioner on the ground of non-availability of DSC Authorization at the time of bid is just and proper.

❖ **Facts relevant in W.P. (C) No.17676 of 2020 :-**

5. Petitioner is a Joint Venture Enterprise consisting of two Companies, namely M/s. Kiansara Infra Project Pvt. Ltd. and M/s. Pranabnaman Minerals Pvt. Ltd. It participated in the bid along with the Petitioner in another Writ Petition and Opposite Party Nos.3 to 6. During the Technical Evaluation, Opposite Party No.1 found certain deficiency with the documents uploaded by the Petitioners and thereby vide email dated 25.06.2020 directed the Petitioner to cure such deficiency by providing confirmatory documents as per Clause 15 (B). The Petitioner is stated to have complied with all the instructions and directions of Opposite Party Nos.1 and 2. In spite of such cooperation, the Petitioner has been debarred from participating in the Financial Bid on the ground that it lacks requisite Work Experience in terms of the Value of Work and Quantity of Work.

5.1 Opposite Party Nos.1 and 2 have filed Counter Affidavit, and in detail they have underlined the following defects in the bid of the Petitioner :-

(i) Experience regarding Start Date and End Date of the work is not commensurate with the requirement of Opposite Party No.1

– Company and it was not in accordance with Clause 8 (A), (i), (ii), (iii), (v) and (vi) of the NIT.

(ii) The Petitioner lacks adequate experience so far as Value of Work and Quantity of Work, as required by Opposite Party No.1 – Company, is concerned.

5.2 On the face of rival contention, the issue that emerges in the present writ petition is more an issue of facts than an issue of law or issue of mixed question of fact and law. It is to be decided simply, as to whether the petitioner has been debarred owing to the defects in the decision making process.

6. Law on the subject is well settled and no more *res integra.*

Taking into consideration a catena of its own earlier decisions, Hon'ble Supreme Court, in **B.S.N. JOSHI & SONS LTD. *v.* NAIR COAL SERVICES LTD. (2006) 11 SCC 548,** have delineated the following legal principles, which are applicable to the award of Government Contracts / Tenders :-

(i) 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 to the main object to be achieved by the condition. (Para 61)

(ii) If there are essential tender conditions, the same must be adhered to. If a party fails and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. [Paras 66(i) and 69)

(iii) If there is no power of general relaxation of tender conditions, 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. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction. [Paras 66(ii) and 69]

(iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of such tender conditions, ordinarily again a power of relaxation may be held to be existing. 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 conditions which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction. [Paras 66(iii) & (iv)]

(v) When a decision is taken by the appropriate authority upon due consideration of the tender documents 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. [Para 66(v)]

(vi) The bidding contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match the rates quoted by the lowest tender, public interest would be given priority. [Para 66(vi)]

(vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint. [Para 66(vii)].

(viii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. (Para 69)

(ix) A contract need not be given to the lowest tenderer and the employer is the best judge therefor; the same ordinarily being within the employer's domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face

of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities. (Paras 56 & 68)

(x) Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor. (Paras 67 and 23)

Out of the principles delineated supra, principle Nos.(i), (ii), (iii), (v), (vii), (viii), (ix) and (x) may be relevant for our purpose in the present case.

6.1 Hon'ble Supreme Court, in the case of **Vidarbha Irrigation Development Corporation *v.* Anoj Kumar Garwala, 2019 SCC OnLine SC 89,** in paragraph-15, have quoted some of the aforesaid principles with approval.

6.2 Hon'ble Supreme Court, in the case of **Afcons Infrastructure Ltd. *v.* Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818,** in paragraphs 14 and 15, have ruled thus :-

"14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty *v.* International Airport Authority of India [Ramana Dayaram Shetty *v.* International Airport Authority of India, (1979)

3 SCC 489] was decided almost 40 years ago, namely, **that the words used in the tender documents cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance.** In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

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."

(emphasis supplied by us)

It is clear, on reading of the aforesaid judgment, that the words used in the Tender Documents cannot be ignored or treated as redundant or superfluous. They must be given meaning and their necessary significance.

6.3 Hon'ble Supreme Court, in the case of **MUNICIPAL COUNCIL, NEEMUCH *vs.* MAHADEO REAL ESTATE AND OTHERS, (2019) 10 SCC 738,** while discussing the scope of judicial review of administrative action, has ruled that the scope of judicial review of an administrative action 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 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 the High Court to interfere in the decision-making process. It is not permissible for the Court to examine the validity of the decision but the Court can examine only the correctness of the decision-making process.

It is settled that Constitutional Courts are concerned only with the lawfulness of the decision and not its soundness. *[see **Central Coalfields Limited & Anr. Vs. SLL-SML (Joint Venture Consortium) & Anr., (2016) 8 SCC 622]*** . To put it differently, Courts ought not to sit in appeal over the decision of the employer and plausible decision need not be overturned.

6.4 In **Tata Cellular *vs.* Union of India, MANU/SC/0002/1996 : (1994) 6 SCC 651,** it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are : -

94.....

(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 peaking, 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.

6.5 In **Raunaq International Ltd. *vs.* I.V.R. Construction Ltd., MANU/SC/0770/1998 : (1999) 1 SCC 492,** Hon'ble Supreme Court held that

superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.

6.6 In **Air India Limited *vs.* Cochin International Airport Ltd., MANU/SC/3402/2000 : (2000) 2 SCC 617,** Hon'ble Supreme Court once again stressed the need for overwhelming public interest to justify judicial intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

6.7 In **Karnataka SIIDC Ltd. *vs.* Cavalet India Ltd., MANU/SC/0234/2005 : (2005) 4 SCC 456,** it was held that while effective steps must be taken to realize the maximum amount, the High Court exercising its power under Article 226 of the Constitution is not competent to decide the correctness of the sale affected by the Corporation.

6.8 In **Master Marine Services (P) Ltd. *vs.* Metcalfe & Hodgkinson (P) Ltd., MANU/SC/0300/2005 : (2005) 6 SCC 138,** it was held that while exercising power of judicial review in respect of contracts, the Court should concern itself primarily with the question, whether there has been any infirmity in the decision-making process. By way of judicial review, Court cannot examine details of terms of contract which have been entered into by public bodies or State.

6.9 In **Jagdish Mandal *vs.* State of Orissa, MANU/sc/0090/2007 : (2007) 14 SCC 517,** it was held :-

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

(emphasis supplied by us)

6.10 In **Michigan Rubber (India) Ltd. *vs.* State of Karnataka and Ors., MANU/SC/0662/2012 : (2012) 8 SCC 216,** it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

6.11 In **Afcons Infrastructure Ltd. *vs.* Nagpur Metro Rail Corporation Ltd., MANU/SC/1003/2016 : (2016) 16 SCC 818 : 2016 KHC 6606,** it as held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. 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. 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.

6.12 In **Montecarlo *vs.* NTPC Ltd., MANU/SC/1313/2016 : AIR 2016 SC 4946,** it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an

ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

6.13 In **Municipal Corporation, Ujjain and Anr. *vs.* BVG India Ltd. and Ors., MANU /SC / 0293/2018 : (2018) 5 SCC 462,** it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/company to carry out the work. 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.

6.14 Most recently, Hon'ble Supreme Court, in **Caretel Infotech Limited *vs.* Hindustan Petroleum Corporation Limited and Ors., 2019 (6) SCALE 70,** observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

6.15 Going further, in **Air India Ltd. *vs.* Cochin International Airport Ltd. & Ors., (2000) 2 SCC 617,** while relying on its several earlier decisions on the law relating to award of contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government, the Hon'ble Supreme Court observed as under :-

> "7…….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 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. 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."

6.16 Hon'ble Supreme Court, in the case of **Siemens Public Communication Networks Pvt. Ltd. & Anr. *vs.* Union of India & Ors., (2008) 16 SCC 215,** while dealing with the scope of judicial review of the constitutional courts, held that, in matters of highly technical nature, a high degree of care, precision and strict adherence to requirements of bid is necessary. Decision making process of Government or its instrumentality should exclude remotest possibility or discrimination, arbitrariness and favoritism. It should be transparent, fair, bona fide and in public interest. However, the Supreme Court clearly held therein that it is not possible to rewrite entries in bid document and read into the bid document, terms that did not exist therein, nor is it permissible to improve upon the bid originally made by a bidder. Power of judicial review can only be exercised when the decision making process is so arbitrary or irrational that no responsible authority acting reasonably or lawfully could have taken such decision, but if it is bona fide and in public interest, court will not interfere with the same in exercise of power of judicial review even if there is a procedural lacuna. Principles of

equity and natural justice do not operate in the field of such commercial transactions.

6.17 Further, Hon'ble the Supreme Court, in the case of **Meerut Development Authority *vs.* Association of Management Studies & Anr., (2009) 6 SCC 171,** held that, the tender is an offer, which invite and is communicated to notify acceptance. It must be an unconditional, must be in the proper form, and the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to a judicial scrutiny because the invitation to tender is in the realm of contract. Only a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders 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 tender in a transparent manner and free from hidden agenda. The authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons. The action taken by the authorities in awarding contracts can be judged and tested in the light of Article 14 of the Constitution of India and the Court cannot examine details of the terms of the contract entered into by public bodies or State. The Court has inherent limitations on the scope of any such enquiry.

7. Having understood the law relating to Bid and Tender, we shall now advert to the case on merit. For convenience, Writ Petition (Civil) No.17676 of 2020 is taken up first.

7.1 Clause 8 of the NIT, which deals with the Eligibility Criteria to apply for the Tender, clearly stipulates as under :-

"8. Eligibility Criteria :

A. Work Experience **:** The bidder must have experience of works (includes completed / ongoing) of similar nature (as per definition of similar nature of work given below) valuing 50% of the annualized estimated value of the work put to tender (for period of completion over 1 year)/ 50% of the estimated value of the work (for completion period up to one year) put to Tender in any year (consecutive 365 days) during last 7 (seven) years ending last day of the month previous to the one in which bid applications are invited.

"Annualised Value" of the work shall be calculated as the Estimated value / Period of Completion in Days x 365".

The value of executed works shall be given a simple weightage to bring them at current price level by adding 5% for each completed year (total number of days / 365) after the end date of experience till the last day of month previous to one in which e-tender has been invited.

The definition of similar work shall be as follows :-

Loading of coal / any mineral / soil / ash / stone / rejects by Pay Loaders / Excavator into railway wagons / tippers / trucks and Transportation of excavated / stacked / crushed coal / any mineral / soil / ash / stone / rejects by Tippers / Trucks will be considered to be of similar work. Transportation of consumer goods, etc. will not be considered.

In respect of the above eligibility criteria, the bidders are required to furnish the following information on-line :

I. Start date of the year for which work experience of bidder is to be considered for eligibility.

II. Start date and end date of each qualifying experience (similar nature)

III. Work Order Number / Agreement Number of each experience.

IV. Name and address of Employer / Work Order Issuing Authority of each experience.

V. Percentage (5) share of each experience (100% in cae of an Individual / proprietorship firm or the actual % of share in case of a Joint Venture / Partnership firm).

VI. Executed Value of work against each experience.

VII. In case the bidder is a Joint Venture, the work experience of any one, two or three of the individual partners of JV or the JV itself may be furnished as the work experience of the bidder.

……"

7.2 Clause 14 of the NIT, which deals with Confirmatory documents required to be uploaded by the bidder against the Eligibility Criteria in support of information / declaration furnished by him online, under sub-clause (1), states as under :-

Clause 14 - The following supportive documents of all the bidders shall be downloaded for evaluation by the Tender Inviting Authority.

Sl. No.	Eligibility Criteria	Scanned copy of documents, to be uploaded in support of information / declaration furnished online by the bidder against Eligibility Criteria as Confirmatory Document.
1.	Work Experience (Ref. Clause No.8(A) of NIT)	For work experience bidders are required to submit Work Experience (includes completed / ongoing Certificate issued by the employer against the Experience of similar work containing all the information as sought online. Bidder should also submit Work Order, BOQ and/or TDS along with the bid.
xx xx	xx xx xx xx	xx xx xx xx xx

7.3 Clause 15 of the said NIT deals with the Technical Evaluation of Tenders and states as under :-

"**<u>Clause 15 – Technical Evaluation of Tender</u> :**

A. xx xx xx xx xx

B. In case the Tender Committee finds that there is some deficiency in uploaded documents corresponding to the information furnished online or in case corresponding documents have not been uploaded by bidder(s), then the same will be specified online by Evaluator clearly indicating the omissions / shortcomings in the uploaded documents and indicating start

date and end date allowing 7 days (7 x 24 hours) time for online resubmission by bidder(s). The bidder(s) will get this information on their personalized dash board under "Upload Confirmatory Document" link. Additionally, information shall also be sent by system generated e-mail and SMS, but it will be the bidder's responsibility to check the updated status / information on their personalized dash board regularly after opening of bid. No separate communication will be required in this regard. Non-receipt of e-mail and SMS will not be accepted as a reason of non-submission of documents within prescribed time. The bidder(s) will upload the scanned copy of all those specified documents in support of the information / declarations furnished by them online within the specified period of 7 days. No further clarification shall be sought from the Bidder.

C. xx xx xx xx xx xx

D. xx xx xx xx xx xx

E. xx xx xx xx xx xx

F. xx xx xx xx xx xx

G. In case of bidder(s) fails to confirm the online submitted information(s) / declaration(s) by the submitted documents as (B) above, their / his bid shall be rejected; however, if the confirmatory documents do not change eligibility status of the bidder in connection with his submitted online information(s) / declaration(s), then his / their bid will be accepted for opening of Price Bid.

H. xx xx xx xx xx xx

……"

8. The Petitioner in the present Writ Petition, in its technical bid, is shown to have submitted 10 numbers of Work Orders from Jindal Powers Ltd. and five numbers of Work Orders from D.B. Powers Ltd. along with two numbers of Work Experience Certificate (one from each of the two aforementioned companies). The aforesaid certificates submitted by the Petitioner – Company neither had any mention of Work Order Number / Agreement Number or the Executed Value of the Work for each specified experience, nor of the "Work Evaluation Period" of each experience mandatorily required under Clause 8 (A) I, II, III & VI and Clause 14(1) of the NIT dated 26.05.2020.

8.1 The Tender Committee, in accordance with the terms mentioned in the NIT, opened the bids received from various bidders pursuant to the Tender Call Notice for technical evaluation of the bids and in due course of such technical evaluation process, observed that the bid of the Petitioner – Company suffer from a number of discrepancies. On 25.06.2020 the Technical Evaluation Committee in accordance with Clause 15 (B) of the NIT, sought online clarification from the Petitioner stating therein that apart from other discrepancies, the Work Experience Certificate submitted by the Petitioner – Company neither specifies Work Order Number nor the period of execution of each Work Orders (start date of the work and end date of the work) nor the exact value of the executed work, therein further requesting the Petitioner Company to upload documents online to that effect within a period of seven days from the date of issuance of the Notice.

8.2 The Petitioner Company, on receipt of the Notice from the Technical Evaluator, on 02.07.2020 uploaded three numbers of Work Experience Certificate (two from Jindal Powers Ltd. and one from D.B.

Powers Ltd.) issued in favour of one of the constituents of the Petitioner's Joint Venture Company. The aforesaid Work Experience Certificate so uploaded also did not fulfill the requirement of Clause 8(A) and Clause 14(1) of the NIT, as the two numbers of Work Experience Certificate issued by M/s. Jindal Powers Ltd. were issued on 01.07.2020, i.e. 15 days after the last date of submission of the bid and the documents submitted along with such certificate containing details regarding the value of work executed were self-certified by the Petitioner's constituent company M/s. Pranabnaman Minerals Pvt. Ltd. (PVMPN) and not by the employer, as required by the NIT.

8.3 Further, the Work Experience Certificate issued in favour of the Petitioner Company by M/s. D.B. Powers Ltd. mentioned the quantity of work that was executed, but there was no mention of either the value of the work executed nor the Work Order Number nor the period for which the said work was undertaken in complete non-compliance of the requirements stipulated in Clause 8 (A) and Clause 14(1) of the NIT and instructions by the Technical Evaluation Committee dated 25.06.2020 seeking clarification.

8.4 From the aforesaid discussions, it is clear that the Petitioner Company lacked experience as required by the NIT and especially Clause 8 (A) and Clause 14 (1) of the NIT. He was short of Work Experience in terms of value of the work and quantity of work.

8.5 In course of hearing, assuming arguendo, the documents supplied by the Petitioner to be genuine and true, we made addition of the Work Experience Certificates given by the Petitioner and it was found that the Work Experience Certificate fall short of the required value of Rs.36,52,65,140/- within the given period. The Petitioner having failed to

satisfy the requirement of the NIT, the bid has been rightly rejected at the stage of technical evaluation.

8.6 We are of the view that, there is no defect in the decision making process in course of the technical evaluation and the Petitioner Company has been rightly debarred from participating in the financial / price bid.

9. Coming to the facts in W.P. (C) No.16516 of 2020, it is found from page – 72 of the Writ Petition, vide Annexure – 6 series, that the bid of the Petitioner for the tender in question has been rejected during technical evaluation by the duly constituted committee for the reason that D.S.C Authorization at the time of bid is not available and the Power of Attorney was executed on 26.06.2020, whereas the bid submission date was 16.06.2020.

9.1 Mr. Ashok Mohanty, learned Senior Counsel appearing for the Petitioners, relying on Clause 14 (5) of the NIT, submits that the Petitioner had, inter alia, submitted the following documents along with the bid.

(i) Memorandum of Association (page 39 of the Writ Petition)

(ii) Article of Association (page 49 of the Writ Petition)

(iii) Signatory details (page 60 of the Writ Petition)

(iv) Board of Directors' Resolution dated 05.06.2020 (page 68 of the Writ Petition).

It is further submitted by Mr. Ashok Mohanty, learned Senior Counsel, that it is evident from the Articles of Association and the Signatory Details attached to it, that Petitioner No.2 – Kamalpat Dalmia is a Director of Petitioner No.1 – Company having a registered D.S.C. It is also evident from the Board of Directors' Resolution dated 05.06.2020 that, Kamalpat Dalmia

(Petitioner No.2) has been authorized by Petitioner No.1 Company to sign and submit the bid in question on behalf of Petitioner No.1 Company. In that view of the matter, it is vehemently argued by Mr. Mohanty, learned Senior Counsel that the Petitioner has complied with Clause 14(5) of the NIT in so far as the requirement of **"any sort of legally acceptable document for the authority to bid on behalf of the bidder"** is concerned.

Mr. Mohanty, learned Senior Counsel for the Petitioners further draws our attention to the Central Public Procurement Portal, Govt. of India FAQ No.11 at page 74 of the Writ Petition, wherein it has been clarified that D.S.C. is not required by the Company for submission of Tender, instead, an individual like the Director of a Company can use its D.S.C. on behalf of the Company to bid. With all the vehemence at his command, Mr. Mohanty, learned Senior Counsel for the Petitioners submits that the Board of Directors' Resolution dated 05.06.2020 authorizing Petitioner No.2 – Kamalpat Dalmia to sign and submit the bid in question on behalf of Petitioner No.1 Company is sufficient to satisfy the requirement of Clause 14 (5) of the NIT.

9.2 Mr. Rakesh Sharma, learned counsel appearing for Opposite Party Nos.1 and 2, submits that Petitioner No.2 – Kamalpat Dalmia being not the bidder himself, it was incumbent on his part to have an Authorization / Power of Attorney from Petitioner No.1 Company to use his D.S.C. for bidding on behalf of the Company. Admittedly, it is nobody's case that Kamalpat Dalmia (Petitioner No.2) was bidding for himself. It is an accepted fact that he was bidding on behalf of Petitioner No.1 Company.

It is further submitted by Mr. Sharma, learned counsel for Opposite Parties 1 and 2 that, pursuant to the clarification uploaded on 26.06.2020 by the technical evaluators, the Petitioner uploaded two

documents, namely, the extract of Board of Directors' Resolution dated 05.06.2020, authorizing Petitioner No.2 to submit the bid and sign the agreement, etc. on behalf of Petitioner No.1 Company, and Power of Attorney dated 26.06.2020 authorizing Petitioner No.2 to do authorized acts required for submitting the Tender (Annexure-5 series). In the said Power of Attorney dated 26.06.2020, at point No.2 it has been specifically mentioned that, **"to get issued Digital Signature Certificate (D.S.C) in the name of the Company and to use the D.S.C. on behalf of the Company for submitting the Tender."**

Mr. Sharma, learned counsel further proceeds to submit that, on scrutiny of the above mentioned two documents, it was seen that nowhere it has been mentioned that Petitioner No.2 – Kamalpat Dalmia is authorized to use his D.S.C., specifically on behalf of the Company – Petitioner No.1. On further scrutiny it was seen that the Power of Attorney executed authorizing Petitioner No.2 to use the D.S.C. on behalf of the Company was dated 26.06.2020, whereas the last date of submission of the bid was 16.06.2020. In that view of the matter, it is argued by Mr. Sharma that on the date of submission of the bid, i.e. 16.06.2020 Petitioner No.2 was not authorized to use his D.S.C. to submit the bid on behalf of the Company – Petitioner No.1.

Mr. Sharma, learned counsel for O.Ps.1 and 2 sums up his argument by submitting that the Technical Evaluation Committee, taking into consideration the above mentioned discrepancies / short falls in the bid documents submitted by the Petitioner, rejected the technical bid of the Petitioner, as the same was not in consonance with Clause 14 (5) of the NIT. Therefore, it cannot be held that the Opposite Parties have done any illegality in rejecting the technical bid of the Petitioner and opening the price bid to Opposite Party Nos.3 to 6, which qualified technically.

Learned counsel appearing for Opposite Party No.3 supports the argument tendered by Mr. Rakesh Sharma, learned counsel for O.Ps.1 and 2.

10. The relevant Clauses of the NIT are extracted below for ready reference :-

Clause 10 of the NIT dated 26.05.2020 deals with submission of Bids, which reads thus :-

"Clause 10 – Submission of Bid :

a. In order to submit the Bid, the bidders have to get themselves registered online on the e-procurement portal (https://coalindiatenders.nic.in) with valid Digital Signature Certificate (DSC) issued from any agency authorized by Controller of Certifying Authority (CCA), Govt. of India and which can be traced up to the chain of trust to the Root Certificate of CCA. The online registration of the Bidders on the portal will be free of cost and on-time activity only. The registration should be in the name of the bidder, whereas the DSC holder may be either the bidder himself or his duly authorized person. (For JV Ref. Cl.7(ix) & (xvi).

b. xx xx xx xx xx

c. xx xx xx xx xx

d. Letter of Bid : The format of Letter of Bid (as given in the NIT at Annexure-VII) will be downloaded by the bidder and will be printed on Bidder's letter head and the scanned copy of the same will be uploaded during bid submission in cover-I. This will be the covering letter of the bidder for his

submitted bid. The content of the "Letter of Bid" uploaded by the bidder must be the same as per the format downloaded from website and it should not contain any other information.

The Letter of bid will be digitally signed by DSC holder submitting bid online and it does not require any physical signature. However, if the Letter of Bid (LoB) bears the physical signature in addition to the digital signature of the DSC holder, it will be accepted without questioning the identity of person signing the Letter of Bid.

If there is any change in the contents of Letter of Bid uploaded by bidder as compared to the formant of Letter of Bid uploaded by the department with NIT document, then the bid will be rejected.

e. Confirmatory Documents : All the confirmatory documents as enlisted in the NIT at Clause No.14 in support of online information submitted by the bidder are to be uploaded in cover-I by the bidder while submitting his/her bid.

f. xx xx xx xx xx

10.1 Clause 14 of the NIT deals with Confirmatory Documents required to be uploaded by the bidder against the Eligibility Criteria in support of information / declaration furnished by him online, which reads thus :-

"Clause 14 – The following supportive documents of all the bidders shall be downloaded for evaluation by the Tender Inviting Authority.

Sl. No	**Eligibility Criteria**	**Scanned copy of documents, to be uploaded by in support of information / declaration**

		furnished online by the bidder against Eligibility Criteria as Confirmatory Document.
1.	xx xx xx	xx xx xx xx xx xx
2.	xx xx xx	xx xx xx xx xx xx
3.	xx xx xx	xx xx xx xx xx xx
4.	Legal Status of the bidder	Any one of the following documents : 1. Affidavit or any other document to prove proprietorship / Individual status of the bidder. 2. Partnership deed containing name of partners. 3. Memorandum and Articles of Association with certificate of incorporation containing name of bidder. 4. i) Joint Venture agreement as per ***Annexure-IV.*** ii) Power of Attorney to the Lead Partner. iii) The document(s) regarding legal status of all the individual partners of JV, as mentioned in sl.No.1 or 2 or 3 above, as applicable, and iv) Authorization to all the signatories of JV agreement by the respective partners of JV either in the form of Power of Attorney or any sort of legally acceptable document as applicable.
5.	Digital Signature Certificate (DSC)	If the bidder himself is the DSC holder bidding on-line, then no document is required. However, if the DSC holder is bidding online on behalf of the bidder, then the Power of Attorney

		or any sort of legally acceptable document for the authority to bid on behalf of the bidder.
xx xx	xx xx xx	xx xx xx xx xx xx

10.2 A cursory reading of Clause 10 of the NIT makes it clear that the bidders have to get themselves registered online on the e-procurement portal with valid Digital Signature Certificate (DSC) issued from any agency authorized by the Controller of Certifying Authority ('CAA' for short) and the registration of the bid should be done in the name of the bidder, whereas the DSC holder may be either the bidder himself or his duly authorized person.

10.3 It is pertinent to make a reference to Point No.11 of the FAQ of the Central Public Procurement Portal, Govt. of India, which is a part of the NIT and is enclosed with the Writ Petition vide Annexure-8. Clause 11 of the FAQ reads thus :-

> **"11. Is a company required to obtain a Digital Signature Certificate in its own name for e-tendering ?**
>
> Digital Signature Certificate (DSC) is not required by Companies but by individuals. For example the Director or the Authorized Signatory signing on behalf of the Company requires a DSC. ……"

Admittedly, pursuant to the NIT dated 26.05.2020, Petitioner No.1 Company submitted its bid online through Petitioner No.2 – Kamalpat Dalmia and said Kamalpat Dalmia was bidding on behalf of Petitioner No.1 Company.

10.4 Considering the fact that Bid was submitted online on behalf Petitioner No.1 Company by Kamalpat Dalmia (Petitioner No.2), the said

Petitioner No.2 was required to submit such Bid using his own Digital Signature Certificate (DSC) with a further Power of Attorney issued in his favour or an Authorization from the Board of Directors of the Company specifically authorizing him (Petitioner No.2) to bid on behalf of Petitioner No.1 Company in the aforesaid Tender, using his on DSC.

In course of Technical Evaluation Process, the Evaluators came across such discrepancies in the bid submitted by Petitioner No.2 on behalf of Petitioner No.1 Company and sought for online clarification with regard to the same on 26.06.2020. Such clarification sought vide Annexure-4 to the Writ Petition reads thus :-

> "Uploaded affidavit dated 10.06.2020, in which authorization to use DSC on behalf of the Company is not mentioned. Kindly upload the affidavit mentioning authorization to use DSC on behalf of the Company."

The affidavit dated 10.06.2020 is at page 62 of the Writ Petition, wherein at point No.1 the deponent Kamalpat Dalmia has stated that he is the applicant for Contract Job under the office of the General Manager (CMC, P.O.- Jagruti Bihar, Burla, Sambalpur, Odisha).

10.5 On receiving clarification notice dated 26.06.2020, the Petitioner Company uploaded online two documents to show authorization to use DSC on behalf of Petitioner No.1 Company, viz.

(i) An extract of the Resolution of the Board of Directors dated 05.06.2020 and

(ii) A Power of Attorney dated 26.06.2020, which was executed in favour of Petitioner No.2 – Kamalpat Dalmia.

On consideration of the aforesaid facts and different Clauses of the NIT, we were inclined to do joint reading of Point No.11 of the FAQ, Central Public Procurement Portal of Govt. of India and Clause 14 (5) of the NIT, as extracted supra. A joint reading of both the items clearly reveal that, when a bid is made on behalf of the Company, then the official / Director / person bidding on behalf of the Company in the bid process, shall have his own personal DSC along with an authorization from the Board of Directors of the Company or a Power of Attorney duly executed by the Company in favour of such person / Director / or officer to use his own DSC to bid on behalf of the Company.

10.6 The bid of Petitioner No.1 Company in the present case was admittedly submitted online on behalf of Petitioner No.1 Company by Petitioner No.2 – Kamalpat Dalmia, and therefore Petitioner no.2 was required to bid on behalf of Petitioner No.1 Company by using his own DSC with further authorization by a Power of Attorney duly executed by the Company to bid on behalf of Petitioner No.1 Company using his own DSC. To the contrary, in the present case, Petitioner No.2 while bidding on behalf of Petitioner No.1 Company, in the affidavit dated 10.06.2020 has testified that he is the applicant for the Tender. Neither he used his DSC to bid on behalf of Petitioner No.1 Company nor did he upload any authorization for doing so on behalf of the Company while submitting the bid documents, in clear contravention of Clause 14 (5) of the NIT.

10.7 Mr. Ashok Mohanty, learned Senior Counsel appearing for the Petitioners relies on heavily on the wordings of Clause 14 (5) of the NIT …

"…… or any sort of legally acceptable document for the authority to bid on behalf of the bidder……"

Taking a clue from the aforesaid wordings, Mr. Mohanty, learned Senior Counsel relies on the Board of Directors' Resolution dated 05.06.2020 authorizing Petitioner No.2 – Kamalpat Dalmia to sign, submit and execute and do all such acts of bids and things for Mahanadi Coalfields Ltd.

The aforesaid Board of Directors' Resolution dated 05.06.2020 is however totally silent regarding use of the DSC by Petitioner No.2 on behalf of Petitioner No.1 Company. Such a discrepancy in the document relied on by Mr. Mohanty, learned Senior Counsel takes him no where. As the document dated 05.06.2020, i.e. Board of Directors' Resolution was totally silent regarding use of his DSC by Petitioner No.2 on behalf of Petitioner No.1 Company, Petitioner No.2 had no authority to use his own DSC to submit the bid on behalf of the Company, i.e. Petitioner No.1 at the time of bid.

10.8 It is further argued by Mr. Mohanty, learned Senior Counsel that, once the Board of Directors Resolution dated 05.06.2020 (Annexure-5 series) authorizes Petitioner No.2 – Kamalpat Dalmia to act on behalf of the Company, insistence by Opposite Party Nos.1 and 2 for a separate Power of Attorney authorizing him (Petitioner No.2) to use his DSC is a non-essential condition, which could have been waived.

To such submission, our answer would be, after participating in the tender process, accepting the conditions in the NIT, raising a submission for waiver of a condition as non-essential, is not sustainable in the eye of law.

11. In fine, therefore, we are of the view that, the Technical Evaluation Committee has not done any infirmity in the Decision Making Process and has rightly rejected the bid of the Petitioners at the stage of technical evaluation. We are constrained to hold this, because the Power of Attorney authorizing Petitioner No.2 – Kamalpat Dalmia to use his DSC was

subsequent to the date of Tender and the Board of Directors Resolution dated 05.06.2020 vide Annexure-5 series is silent about use of his own DSC by Petitioner No.2.

12. Accordingly, on the basis of the aforesaid discussion in paragraphs- 8, 9 and 10, both the Writ Petitions are dismissed, but without any costs.

(C.R. Dash)
Judge

(Mohammad Rafiq)
Chief Justice

S.K. Parida,
A.R.-cum-Sr. Secretary.