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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on: 04/12/2020

Judgment Delivered on : 09/12/2020

Writ Petition (C) No. 2195 of 2020

- M/s Anil Rubber Mills Pvt. Ltd. a Private Company registered under the Companies Act, 1956, having its registered office at D-837, New Friends Colony, New Delhi 110025, through its Managing Director Sh. Anil Khanna, S/o Late Atam Sarup Khanna, Aged About 69 Years.

---- Petitioner

Versus

1. Steel Authority of India Ltd. through its Managing Director, Ispat Bhawan, Lodhi Road, Delhi.
2. Bhilai Steel Plant, through its Chief General Manager (MM), Bhilai Steel Plant Bhilai, District Durg Chhattisgarh
3. AGM (Purchase - Cons & Brg) Bhilai Steel Plant, Bhilai, District Durg Chhattisgarh.

---- Respondents

Writ Petition (C) No. 2196 of 2020

- M/s Anil Rubber Mills Pvt. Ltd. a Private Company registered under the Companies Act, 1956, having its registered office at D-837, New Friends Colony, New Delhi 110025, through its Managing Director Sh. Anil Khanna, S/o Late Atam Sarup Khanna, Aged About 69 Years.

---- Petitioner

Versus

1. Steel Authority of India Ltd. through its Managing Director, Ispat Bhawan, Lodhi Road, Delhi.
2. Bhilai Steel Plant, through its Chief General Manager (MM), Bhilai Steel Plant Bhilai, District Durg Chhattisgarh
3. AGM (Purchase - Cons & Brg) Bhilai Steel Plant, Bhilai, District Durg Chhattisgarh.

---- Respondents

Writ Petition (C) No. 2197 of 2020

- M/s Anil Rubber Mills Pvt. Ltd. a Private Company registered under the Companies Act, 1956, having its registered office at D-837, New Friends Colony, New Delhi 110025, through its Managing Director Sh. Anil Khanna, S/o Late Atam Sarup Khanna, Aged About 69 Years.

---- Petitioner

Versus

1. Steel Authority of India Ltd. through its Managing Director, Ispat Bhawan, Lodhi Road, Delhi.
2. Bhilai Steel Plant, through its Chief General Manager (MM), Bhilai Steel Plant Bhilai, District Durg Chhattisgarh
3. AGM (Purchase - Cons & Brg) Bhilai Steel Plant, Bhilai, District Durg Chhattisgarh.

---- Respondents

For Petitioner	:	Shri J.K.Gilda, Senior Advocate with Shri Harshwardhan, Advocate.
For Respondent No. 1	:	None
For Respondents 2 & 3	:	Dr. N.K.Shukla, Senior Advocate with Shri B.D.Guru, Advocate.

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C.A.V. Judgment

***Per* P.R. Ramachandra Menon, Chief Justice**

1. Can the stipulation in the tender notification to the effect that the product to be supplied shall be manufactured deploying a particular type of machinery/process, be termed as arbitrary or unreasonable, to call for interference by way of judicial scrutiny, is the question involved in these writ petitions.

2. Writ Petition (C) No. 2195 of 2020 is stated as the lead case and the parties and proceedings are referred to as given therein, except where it is separately referred to.

3. The Petitioner claims to be a reputed rubber conveyor belt manufacturing concern registered under the Micro Small and Medium Enterprises Act (for short 'the MSME') and is stated as having long connection with Respondents as supplier of conveyor belts and continues to be one of the existing suppliers under the latest purchase order dated 26.07.2019 (Annexure P/4) issued by the 2nd Respondent. List of various purchase orders (other

purchase orders) issued by the 2nd Respondent-Bhilai Steel Plant (BSP) in favour of the Petitioner has been produced as Annexure P/2 (collectively) and similar purchase orders issued to the Petitioner by other Steel Plants of the 1st Respondent/Steel Authority of India Limited (SAIL) are produced as Annexure P/3. It is the case of the Petitioner that the Petitioner has been satisfying the requirements and effecting the supplies pursuant to the various purchase orders issued at different points of time and there was absolutely no lapse or default in any manner till date, nor was there any instance of any dispute with regard to the quality of the product supplied by the Petitioner.

4. While so, Annexure P/7 tender notification was issued by the 2nd Respondent/BSP on 03.03.2020 for supply of 'conveyor belts'. However, under clause 3 of the 'Eligibility Criteria' of Annexure P/7, it was quite arbitrarily stipulated that the production unit should have a closed chamber internal mixer (excluding kneaders) in operating condition at the own manufacturing unit with the features and functionalities mentioned therein. By virtue of the said clause, the Petitioner is virtually disqualified from participating in the bid for the reason that the Petitioner's production unit comprises of closed chamber 'kneader machines'. According to the Petitioner, there is no tangible qualitative difference between the 'kneader' and 'non-kneader' machines and that the process through a kneader machine does not create any occasion for causing delay in timely delivery of goods. This is sought to be supported by various expert opinions such as Annexure P/10, P/11 and P/12. It is further submitted that the exclusion of kneader machines is contrary to the spirit of inviting MSMEs into the Governmental tender process and is against the public policy.

5. Met with the situation, the Petitioner, who virtually stands prohibited from participating in the tender process under three different tenders (two dated 03.03.2020 and other one dated 06.03.2020) brought the grievance to the notice of the Respondents by filing various representations, collectively produced as

Annexure P/13. In response to this, it was intimated by the 2nd Respondent/BSP vide Annexure P/14 that the prime reason for exclusion of the kneader facility in the eligibility criteria was to ensure and secure the timely receipt of acceptable quality material from the participating vendors and not with any other vested interest to restrict a healthy competition. This made the Petitioner to prefer representations produced as Annexure P/15 which came to be replied by the Respondent as per Annexure P/16 e-mail, virtually repeating the version in Annexure P/14 and stating that it was only to ensure timely receipt of quality materials from the participating vendors and to eliminate any further loss of revenue to the Plant as a result of loss of production.

6. The Petitioner preferred further representation as borne by Annexure P/17, followed by Annexure P/18 and P/19; virtually contending that there was no rhyme or reason for excluding the kneader machines as there was no difference in the products manufactured through the kneader machines and non-kneader machines. It was also pointed out that the Petitioner's unit was having the ability to perform and fulfill the purchase orders as it was having 185 liters capacity (a capacity that outweighs the tender specification of 65 liters closed chamber/ non-kneader machines). Alleging that no corrective measures have been taken from the part of the Respondents, the Petitioner has moved this Court by filing three separate writ petitions in respect of three separate tenders with similar pleadings and prayers. The reliefs sought for in WPC No. 2195 of 2020 which is treated as the lead case, are extracted below for easy reference:

> (i) That, this Hon'ble Court may kindly be pleased to call for the records of the E-Procurement Tender Notice RFX No. 8000013484 dated 03.03.2020 from the respondents.
>
> (ii) That, this Hon'ble Court may kindly be pleased to issue an appropriate writ or order quashing or direction to modify, read down the impugned clause i.e. clause 3(a) as contained in Annexure P/7 of Tender RFX No. 8000013484 dated 03.03.2020.

(iii) That, this Hon'ble Court may kindly be pleased to adjudicate and declare that the petitioner cannot be technically disqualified to participate in the tender process in Tender RFX No. 8000013484 dated 03.03.2020 on the ground that "Bidder should have a Conveyor Production Unit with a closed chamber internal mixer (excluding kneader)".

(iv) That, this Hon'ble Court may be pleased to grant any other relief which the Hon'ble Court deems fit and proper in the facts and circumstances of the present case.

(v) That, the Hon'ble Court in the facts and circumstances of the present case may further be pleased to grant cost of the petition to the petitioner.

7. When the matter came up for consideration before this Court on 21.09.2020, considering the grievance projected in the writ petition and the grounds of challenge, an interim order of *status quo* was passed with regard to the tender proceedings till the next date of hearing, simultaneously directing the Respondents to file their return/statement alongwith copies of the relevant testimonials. Accordingly, the Respondents No. 2 and 3 have filed return with copies of various documents produced as Annexure R 2-3/1 to Annexure R 2-3/34. It is pointed out that the decision to incorporate the eligibility criteria in the tender notification for the first time was made by the Committee of experts vide minutes dated 15.11.2017. The constitution of the Committee was to streamline the procurement process as per the order passed on 10.04.2017 which was approved by the competent authority. The decision to change the earlier eligibility criteria was taken after the Respondent-Company faced acute problems of failure of timely supply of conveyor belt in the cycle prior to previous cycle. It is also pointed out that while examining the cause-effect of failure in timely supply of the conveyor belt, the Committee had come across the NTPC, another Government of India undertaking for procurement of the conveyor belt, where they had also made similar provisions for having equipment closed chamber internal mixer (without kneader) as one of the conditions and it was on realizing the benefit of incorporation of such a clause, that the same was incorporated as one of the eligibility criteria in the tender issued by the Respondents as well.

8. It is pointed out that on incorporating almost a similar condition (similar to the one as incorporated in Annexure P/7) in the previous tender process, the Petitioner had raised an objection (with regard to the necessity of “Banbury” make closed chamber mixing machine) and a representation was submitted which was looked into by the Committee of experts. Based on the recommendation of the Committee as to the modification to be brought about, the matter was considered by the competent authority and after approval by the competent authority, corrigendum notification dated 27.05.2019 was issued vide Annexure R 2-3/7 modifying the eligibility criteria. This made the Petitioner to raise a complaint before the Central Vigilance Officer of the SAIL and on forwarding the same by the Vigilance Department, it was deliberated by the Standing Tender Committee (STC) which held various meetings/deliberations and vide Annexure R 2-3/9 minutes, intimated that the eligibility criteria were in line with the requirements.

9. The reply filed by the Respondents in these cases also makes a reference to the various lapse and shortcomings on the part of the Petitioner in effecting the supplies, also involving the instance of issuance of "risk purchase notice" for default of timely supply. The default on the part of the Petitioner to effect the security deposit within the stipulated time after placing of the order is adverted to and despite granting of further opportunity in this regard, the security deposit was never effected. This led to the issuance of 'risk purchase notice' dated 06.11.2019 (Annexure R 2-3/12) requiring to supply materials by 23.11.2019; failing which risk purchase action shall be taken. It was thereafter that the Petitioner turned up vide a reply dated 08.11.2019, for the first time informing about the *force majeure* condition (though the same was not in accordance with the *force majeure* clause of the PO contract). The Petitioner was only offering lame excuses for not supplying the materials during the delivery period and had sought for extension of time as discernible from Annexure R 2-3/13. Copies of various other documents have also been produced by the

Respondents as to the different communications sent by the Petitioner for extension of time for effecting the supplies. In fact, the Respondents had issued the delivery period of extension as per Annexure R 2-3/24 amendment order dated 27.02.2020. Even though the lockdown was lifted from 01.06.2020 and one month was already available to the Petitioner even before lockdown, the Respondents issued further extension of the delivery period vide Annexure R 2-3/26 order dated 13.07.2020, till 17.08.2020. This being the position, the attempt of the Petitioner to project them as a prompt supplier of the product is not correct and far from the track of truth. It is further stated that the Petitioner has not disclosed in the writ petition that the Petitioner had participated in the tender floated on 03.03.2020. After participating in the tender, the Petitioner is estopped from challenging the same on being declared unsuccessful by virtue of the rejection of the technical bid as disclosed from Annexure R 2-3/28 (records of participation).

10. Shri J.K.Gilda, the learned Senior Counsel for the Petitioner submits that after filing the writ petitions and inspite of passing an interim order by this Court, the purchase orders have been issued by the Respondents to the bidders identified as successful bidders and hence, they are sought to be impleaded in the party array by filing IAs (which however do not forms part of the records). The learned counsel submits that impleadment is necessary in view of the observation made by the Apex Court in paragraph 18 of the judgment reported in ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Another****;* (2016) 16 SCC 818. The Petitioner was informed during the course of hearing that issuance of notice to the successful bidders would arise only if the merit was substantiated and that this would be considered in the due course.

11. The learned Senior Counsel argued the merits of the case elaborately making specific reference to the various expert opinions produced as Annexures P/10, P/11 and P/12; to the effect that there was no much difference with regard

to the manufacture in the closed chamber 'kneader machines' and closed chamber 'non-kneader machines' and as such, incorporation of such a clause in the tender conditions was an unconscionable one serving no purpose but to oust the Petitioner from the zone of participation. It is pointed out that the action on the part of the Respondents is highly arbitrary, unreasonable and *mala fide* which enables this Court to have judicial scrutiny and interdict the proceedings. Reliance is sought to be placed on the verdicts passed by the Apex Court in ***Union of India & Another v. International Trading Co. & Another;*** {(2003) 5 SCC 437 (paragraphs 14 and 15)}, ***Tejas Construction and Infrastructure Private Limited v. Municipal Council, Sendhwa & Another;*** {(2012) 6 SCC 464 (paragraphs 18 onwards)}, ***Montecarlo Limited v. National Thermal Power Corporation Ltd;*** {(2016) 15 SCC 272 (paragraph 26)}, ***Reliance Energy Ltd. & Another v. Maharashtra State Road Development Corpn. Ltd & Others;*** {(2007) 8 SCC 1 (paragraphs 36 to 40)} and ***Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation & Others***; {(2000) 5 SCC 287 (paragraph 10)}.

12. Dr. Shukla, the learned Senior Counsel appearing for the 2nd & 3rd Respondents addressed the Court with reference to the specific pleadings raised in the reply as to the sequence of events. The specific instances as to the delay on the part of the Petitioner in effecting the supplies, the various notices issued in this regard including the 'risk purchase notice' as mentioned already and the cancellation of the purchase order vide Annexure R 2-3/15 are specifically adverted to. The learned counsel also makes a reference to the minutes of the Tender Committee produced as Annexure R 2-3/9; particularly with reference to query No. 2 as to the necessity to have a closed chamber internal mixer (excluding kneaders) in operating condition at its own manufacturing unit with the features and functionalities mentioned. We find it appropriate to have it extracted below:

"Query 2:

Now Bhilai Steel Plant floated above referred two tenders and had modified the Eligibility Criteria and specifically a BRAND of a MACHINE, we are reproducing the line “The production unit should have BANBURY closed chamber mixing facility in operating condition.”

We have vide our letter no. ARM/SAIL_BSP/2019/270 dated 11.05.2019 (Copy attached) objected that how BSP can specify BRAND name of a machine and how can BSP force every manufacturer to buy the machine and asked to amend the eligibility criteria and delete the name of machine.

Apparently BSP changed the eligibility criteria and modify line as “The production unit should have a closed chamber internal mixer (excluding kneaders) in operating conditions.”

Immediately after the above amendment we again objected vide pur letter No.ARM/SAIL_BSP/2019/295 dated 28.05.2019 and ARM/SAIL_BSP/2019/305 dated 01.06.2019 (Copy attached) why kneaders are excluded from “closed chamber internal mixer” whereas kneader is a closed chamber internal mixer with similar features like mixing and rotation of blade, there is no other difference between BANBURY, INTERMIX and KNEADER is speed of mixing and rotation of blade there is no difference then why KNEADER is excluded.

<u>STC Observations</u>:

STC observed that on realisation of the fact that BANBURY is a brand name rather than the name a process, and reference to that creates some restrictive element in the eligibility criteria; BSP took appropriate action well in time and not only made the necessary correction in the criteria, also extended the due date of submission of tender so as to provide necessary time and due opportunity to intending vendors not having that particular make machinery.

However, the representation in the query itself avers that speed of operations at a conveyor manufacturing unit gets slow if they use kneaders. BSP has, in the last tender, suffered badly on account of non-receipt/delayed receipt of material of ordered quality – resulting into operational difficulties as evident from the fact that Risk Purchase action has to be taken in respect of around 20 Kms length out of ordered quantity of 54 Kms.

Hence there is a direct and significant correlation between availability of CCI mixer (& not kneaders) at the vendors facility and operational convenience at BSP in respect of conveyor belts.

As such, exclusion of kneaders in the technical eligibility criteria is as per the specific needs of BSP, more so in view

> of the fact that speedy execution of orders and supply of material against current tender is critically essential due to throttled availability during last cycle."

13. It is pointed out by the learned Senior Counsel that nobody can compel the Respondents to purchase his products unless the requirements as per the tender conditions are satisfied and the party turns to be a successful bidder. It is for the purchaser to stipulate the relevant parameters/ eligibility criteria based on the institutional requirements. It is also pointed out that there is no dispute with regard to the law laid down in the judgments cited by the learned counsel for the Petitioner as to the scope of judicial scrutiny, crux of which is only to the effect that judicial scrutiny is not to be a matter of course, but shall be by way of exception. In the instant case, no arbitrariness, unreasonableness or *mala fides* have been demonstrated and as such, no interference is warranted. Reliance is also sought to be placed on the verdict passed by the Apex Court in ***M/s. Michigan Rubber (India) Ltd. v. State of Karnataka & Others****;* {AIR 2012 SCW 4720} (dealing with the principles which govern judicial review in contractual mattes). It is further pointed out that the interim order of *status quo* was passed by this Court only on 21.09.2020, but after identifying the qualified bidders, the successful bidder was identified and purchase order Annexure R 2-3/32 and 33) in respect of tender notice RFX 8000013485 dated 03.03.2020 was already released before communication of the order of *status quo*, whereas in the other tenders, the purchase orders have not been released, as stated in paragraph 18 of the reply. Referring to the expert opinion procured by the Respondents and as considered by the Committee constituted in this regard, the product manufactured through the 'non-kneader machines' was of better advantage with reference to the chance for delay and also the quality of the product. Incorporation of such a condition was never to exclude anybody from the field and there was no attempt to reduce the competition or to extend undue favours to any particular party.

14. In response to a query raised by this Court as to the total number of participants in the bid and as to the persons qualified in the bids who satisfied the disputed clause notified in Annexure P/7, the learned counsel made a reference to the particulars as given in paragraph 8 of the reply, which is to the following effect:

SL	Vendor's name	RFX 8000013484 Dtd 03.03.2020	RFX 8000013485 Dtd 03.03.2020	RFX 8000013486 Dtd 06.03.2020	Qualified For any of the RFX, if No (Reason)
Price Discovery Date through reverse Auction		15.09.2020	11.09.2020	18.09.2020	
1	M/s NRC Ind. Ltd., (Micro Small Enterprise MSE, for brevity)	Quoted	Quoted	Quoted	Yes
2	M/s Forech India P. Ltd.	Quoted	Quoted	Quoted	Yes
3	M/s Jonson Rubber Ind. (MSE)	Quoted	Quoted	Quoted	Yes
4	M/s Neelkanth Rubber Mills P. Ltd (MSE)	Not Quoted	Quoted (PO Issued on 19.09.2020)	Quoted	Yes
5	M/s ARB Conveyors (MSE)	Quoted	Quoted (PO Issued on 19.09.2020)	Quoted	Yes
6	M/s Hindustan Rubbers (Silvassa) (MSE)	Not Quoted	Quoted	Not Quoted	Yes
7	M/s Century Indl. Products	Quoted	Quoted	Quoted	NO (With Kneader)
8	M/s Anil Rubber Mills Pvt Ltd (MSE)	Quoted	Quoted	Quoted	NO (with Kneader)
9	M/s Oxford Rubber P. Ltd. (MSE)	Quoted	Not Quoted	Not Quoted	NO (with Kneader)
10	M/s Apollo Conveyors P. Ltd. (Medium Enterprise)	Quoted	Quoted	Quoted	Rejected (No EMD)

15. From the above, it is seen that there were 10 participants including the Petitioner; among whom 6 were qualified who were having the products manufactured through a closed chamber internal mixer (excluding kneaders) in operating condition at its own manufacturing unit with the features and functionalities mentioned therein. That apart, out of the 10 participants, 9 bidders including the Petitioner were in the category of 'MSME' and as such, the version

of the Petitioner that the disputed clause was incorporated to exclude the bidders in the MSME segment (like the Petitioner) is devoid of any merit. Since 6 bidders were qualified in the process, it cannot be said that the move was to reduce the chance for competition. It is also relevant to note that, nowhere in the writ petition has the Petitioner raised any specific plea of *mala fides* as the reason for incorporating the disputed clause in the tender conditions for ousting the Petitioner from the field of consideration or to extend undue favours to somebody. In the absence of any such pleading of *mala fides* and for not satisfactorily demonstrating the arbitrariness or unreasonableness in the disputed clause, this Court cannot substitute the terms of tender conditions. Annexure P/10, P/11 and P/12 are only opinions produced by the Petitioner which may vary from the opinion of other experts and if the Respondents have acted on the basis of the opinions they have received from the experts as considered by the Committee constituted in this regard, it cannot be said as arbitrary or unreasonable.

16. With regard to the case laws cited by the Petitioner, the Apex Court has observed in ***International Trading Co.*** (supra) that Article 14 of the Constitution applies also to the matters of Government policies and if the policy or any action of the Government, even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. However, observing that the test of reasonableness as to the change in policy was not demonstrated by the Respondents therein, the appeal filed by the Central Government was allowed. The test of reasonableness for interference in the contract matters was reiterated in the ruling reported in ***Tejas Construction and Infrastructure Private Limited*** (supra) as well. It was stated in crystal clear terms in paragraph 34 that in absence of any *mala fides* or arbitrariness in the process of evaluation of bids and the determination of the eligibility of the bidders, no interference was called for, in turn dismissing the appeal with cost.

17. In ***Montecarlo Limited*** (supra), sought to be relied on by the Petitioner, the Apex Court has observed in paragraph 26 that tenders are amenable to scrutiny by judicial review. But the very same paragraph highlights that exercise of power of judicial review would be called for only if the approach is arbitrary, or *mala fide* or the procedure adopted is meant to favour one; which aspect has not been demonstrated by the Petitioner in the instant case. Similar principles have been stated in ***Reliance Energy Ltd. & Another*** (supra) and while observing that the judicial review covers contractual matters involving the Government as well, so as to prevent the arbitrariness and to be exercised in larger public interest, it has been mentioned in unequivocal terms that the grounds for such judicial review are (i) illegality (ii) irrationality, and; (iii) procedural impropriety. None of these aspects have been substantiated from the part of the Petitioner, but for contending that there is no logic for incorporating the disputed clause.

18. The principles governing contract with reference to the judicial scrutiny were stated in paragraph 10 of ***Monarch Infrastructure (P) Ltd.*** (supra) in the following terms:

> "(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.
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> (ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.
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> (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons."

In the very next paragraph, it has been asserted that the Courts would not interfere with the matters of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is *mala fide*.

19. The Apex Court had occasion to consider the various rulings rendered on the subject involving judicial scrutiny in ***Jagdish Mandal v. State of Orissa & Others;*** {(2007) 14 SCC 517}. Paragraph 22 of the said judgment is in the following terms:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :
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> i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
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> OR
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> 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.'
>
> OR
>
> ii) Whether public interest is affected.
>
> If the answers are in the negative, there should be no interference under Article 226. Cases involving black-

> listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

The said principles were reiterated subsequently in ***Tejas Construction and Infrastructure Private Limited*** (supra).

20. It was after making specific reference to these judgments and such other relevant verdicts that the Apex Court culled out the principles once again in ***M/s. Michigan Rubber (India) Ltd.*** (supra) as given below:

> "19. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
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> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

21. The Apex Court, in paragraph 20 observed that a Court, before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself, the following questions:

> "20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

We have raised such questions to ourselves in conformity with the observations made by the Apex Court as above. Considering the pleadings and materials on record and the submissions made across the Bar, we can answer the questions only in the 'negative'; by virtue of which no interference is possible under Article 226 of the Constitution of India.

22. It is also to be noted that the disputed clause 3(a) of the Annexure P/7 tender conditions stipulates the eligibility criteria that the production unit should have a closed chamber internal mixer (<u>excluding kneaders</u>) in operating condition at its own manufacturing unit with the features and functionalities mentioned therein. This is virtually to the effect that the product to be supplied shall be manufactured in a particular manner by deploying a particular process/type of machinery, as insisted. The Respondents have tried to demonstrate the necessity to incorporate such a clause and also as to the better advantage, both with reference to the delay aspect and also as to the better quality of the product based on the data inputs obtained by them from the experts and found appropriate by the Committee constituted in this regard. The question is whether this Court can modify/substitute or re-write the same merely with reference to the opinion provided by some other experts as procured by the Petitioner.

23. According to the Petitioner, the quality of the product is determined by the raw materials to be used. Definitely, the quality depends up on the raw materials as well; but it need not be exclusive as the 'process' may also have a bearing. Even though the same product can be manufactured using the same raw materials through two different processes, chance is there to have some variation with regard to the quality, which only the experts can say. It is trite law that under the law of patents, apart from the 'patent for products', there can be 'patent for the process' as well. Even in the common parlance, extraction of oil from the oil seeds deploying a "hot process" and also from a "cold process" (where the machinery may vary) is not uncommon and it is said that the product obtained under the "cold process" is having some better qualities in relation to the given context. Taste and quality may vary between the same product prepared from the batter made out using a Wet Grinder and a Mixie, though the ingredients/raw materials remain to be the same. Similar is the difference between the clothes manufactured in a Powerloom and Handloom. It is for the awarder of the contract to stipulate the terms and conditions of the contract for procuring the product of appropriate standards, considering all the relevant aspects including the quantity, quality, delay and such other aspects. It is never for the supplier to dictate terms to the awarder, so as to suit to the convenience of the supplier and there cannot be any interference so long as the stipulation is not arbitrary, illegal or *mala fide*.

24. As pointed out already, there is no pleading anywhere in the writ petition, as to any instance of *mala fide* or as to any attempt on the part of the Respondents to extend undue favours to any particular bidder. The doors for competition are also thrown open and among the 10 participants, 6 have already qualified meeting the requirements as notified under clause 3(a) of Annexure P/7 tender notification. That apart, among the 10 participants, 9 bidders including the Petitioner were amongst the MSME segment and as such, the allegation of the

Petitioner that it is an instance to oust the Petitioner who belongs to MSME segment from the field of consideration, is devoid of any merit.

25. In the above facts and circumstances, we answer the question mooted at the beginning, in the 'negative' and hold that the Petitioner has miserably failed to substantiate any ground for interference, having not demonstrated any instance of arbitrariness, illegality or *mala fides*. Interference is declined and the writ petitions are dismissed accordingly.

Sd/-	Sd/-
(P.R. Ramachandra Menon)	(Parth Prateem Sahu)
CHIEF JUSTICE	**JUDGE**

Amit