THE HIGH COURT OF MADHYA PRADESH : JABALPUR

(Division Bench)

Heard through Video Conferencing

Writ Petition No.26919/2019

Sanuraga Hosiery Pvt. Ltd. ... Petitioner

versus

State of Madhya Pradesh and others ... Respondents

Writ Petition No.26939/2019

Aditya Multicom Pvt. Ltd. ... Petitioner

versus

M.P. State Mining Corporation Ltd. & another ... Respondents

Writ Petition No.4734/2020

M/s R Gangaiah and Co. ... Petitioner

versus

State of Madhya Pradesh and others ... Respondents

Appearance:

Shri Amalpushp Shroti, learned counsel for petitioner in W.P. No.26919/2019.

Shri Devdatt Kamat, learned Senior Counsel with Shri Samdarshi Tiwari, counsel for the petitioner in W.P. Nos.26939/2019 and 4734/2020.

Shri Purushaindra Kaurav, learned Advocate General with Shri Pushpendra Yadav, Additional Advocate General for the respondents/State and M.P. State Mining Corporation Ltd.

Shri Shreyas Dharmadhikari, learned counsel for respondent No.4 in W.P. No.26919/2019.

Shri Vivek Tankha, learned Senior Counsel with Shri Manoj Sharma, counsel for the respondent No.2-M/s R.K. Transport & Constructions Ltd in Writ Petition No.26939/2019.

CORAM :

Hon'ble Shri Justice Sanjay Yadav, Judge

Hon'ble Shri Justice B.K. Shrivastava, Judge

Date of decision : **24.08.2020**14.08.2020

O R D E R

Per Sanjay Yadav, J :-

Since common issue arises for consideration in these batch of writ petitions, accordingly, they were heard analogously and are decided by this common order. Respective petitioners are collectively addressed as 'petitioners'. These petitioners, which are the Companies registered under the Companies Act, 1956, suffer rejection of their bid applications for lease of group of sand quarry at Sidhi, Singrauli and Panna Districts for non-furnishing of 'Pradhikar Patra' with appropriate stamp duty of Rs.1000/-.

2. Relevant facts briefly are that, the respondent/M.P. State Mining Corporation Ltd., a Corporation established by the State of Madhya Pradesh on October 5, 2019, invited e-Tender for auction of group of sand quarries in 43 districts. The controversy in these batch of writ petitions relates to group of sand quarry situated in Districts Sidhi, Singrauli and Panna. The procedure and period of e-Tender of

the group of sand quarry was as per the stipulations contained in Rule 8 of Madhya Pradesh Sand (Mining, Transportation, Storage and Trading) Rule, 2019 (for short "Rules of 2019") framed by the State of Madhya Pradesh in exercise of the powers conferred by Section 15 and Section 23C read with Section 9B of the Mines and Minerals (Development and Regulation) Act, 1957 vide Notification No.F 19-2/2019/XII-1 published in Madhya Pradesh Gazette dated 30.08.2019.

3. The NIT stipulated various terms and conditions to be adhered to by the respective bidders.

4. The relevant, in the present context, being Clauses 5 and 6 of the NIT are reproduced for ready reference :

> **5. <u>ऑनलाईन निविदा प्रस्तुत करना–</u>**
>
> (क) तकनीकी अर्हताः–
>
> (i) निविदाकार दिवालिया न हो एवं निविदाकार पर मध्यप्रदेश शासन, खनिज साधन विभाग के द्वारा आवंटित खदान एवं खनिज के संबंध में कोई शोध्य बकाया न हो एवं यदि ऐसे कोई शोध्य पाये जाते हैं तो उसकी जमा प्रतिभूति रकम से समायोजन योग्य होंगे।
>
> (ii) निविदाकार को पूर्व से खनिज साधन विभाग (मध्यप्रदेश शासन)/निगम द्वारा काली सूची में न डाला गया हो ।
>
> (iii) निविदाकार का भारतीय नागरिक, पंजीकृत फर्म, एल.एल.पी., पंजीकृत सोसायटी या भारतीय कंपनी (Any Legal Person) होना

अनिवार्य है। ऑनलाईन निविदा प्रस्तुत करते समय निविदाकार को निम्नांकित दस्तावेज भी प्रस्तुत करने होंगें।

1.	व्यक्तिगत के लिये	आधार कार्ड/पेन कार्ड
2.	साझेदारी फर्म	रजिस्ट्रार फर्म एवं सोसायटी/अन्य अधिकृत ऐजेंसी द्वारा जारी पंजीयन प्रमाण पत्र
3.	कंपनी के लिये	रजिस्ट्रार ऑफ कंपनी द्वारा जारी सर्टिफिकेट ऑफ इनकार्पोरेशन की प्रति
4.	सोसायटी	सोसायटी अधिनियम के तहत् पंजीयन प्रमाण पत्र
5.	एल.एल.पी.	रजिस्ट्रार ऑफ कंपनीस द्वारा जारी एल.एल.पी. पंजीकरण प्रमाण पत्र

(iv) निविदाकार के पास आयकर विभाग का पेन होना अनिवार्य है।

(ख) **<u>वित्तीय अर्हता</u>**:–

यदि समूह का प्रारंभिक आधार मूल्य (अपसेट प्राईज) रू. दस करोड़ से अधिक है, तो दिनांक 31.03.2019 की स्थिति में निविदाकार की Networth, समूह के प्रारंभिक आधार मूल्य (अपसेट प्राईज) के न्यूनतम 50% के समतुल्य होनी अनिवार्य है। इस हेतु निविदाकार को सनदी लेखाकार (चार्टर्ड एकाउंटेंट) द्वारा, वर्ष 2018–19 के अंकेक्षित लेखों (Standalone basic) के आधार पर, दिनांक 31.03.2019 की स्थिति में, जारी Certificate उपलब्ध कराना अनिवार्य होगा।

यदि वर्ष 2018–19 के लेखे Final न हुए हों, तो ऐसी स्थिति में वर्ष 2017–18 के अंकेक्षित लेखों के आधार पर, दिनांक 31.03.2018 की स्थिति में Networth का उपरोक्तानुसार जारी प्रमाण पत्र मान्य होगा।

6. **<u>ई–निविदा की प्रक्रिया एवं सफल निविदाकार की घोषणा</u>** – (i) ई–निविदा हेतु एन.आई.सी. के अधिकृत पोर्टल https://mptenders.gov.in का उपयोग किया जायेगा।

(ii) रेत खदानों के समूहों एवं उनमें सम्मिलित खदानों, निविदत्त मात्रा, अपसेट प्राइज आदि का विस्तृत विवरण **परिशिष्ट–1** पर देखा जा सकता है।

(iii) इच्छुक निविदाकार द्वारा पोर्टल पर निर्धारित पंजीयन शुल्क का भुगतान कर पंजीयन कराया जाना होगा। पंजीयन उपरांत इच्छुक पंजीकृत व्यक्ति/संस्था को लाग–इन आई.डी. प्राप्त होगी। पंजीयन एवं निविदा में भाग लेने की प्रक्रिया **परिशिष्ट–2** पर देखी जा सकती है।

(iv) ई–निविदा के कार्यकम की सूचना समाचार पत्रों में भी प्रकाशित कराई जावेगी जो कि इस निविदा प्रारूप का भाग होगी।

(v) दस्तावेज जो कि अपलोड किये जाने है :–

(क) <u>तकनीकी दस्तावेज</u>

(i) इच्छुक पंजीकृत व्यक्ति/संस्था द्वारा उपरोक्तानुसार विवरण देखने के पश्चात चाहे अनुसार समूह हेतु निविदा में भाग लेने के पूर्व निगम के साथ परिशिष्ट–3 में इस आशय का करार निष्पादित किया जायेगा कि उसके द्वारा उपरोक्तानुसार ई–निविदा में शामिल किये जाने वाले समूह में शामिल रेत खदानों की स्थिति का मौके पर निरीक्षण कर लिया है एवं समूह में शामिल रेत खदानों में उपलब्ध रेत मात्रा, पहुंच मार्ग एवं अन्य सुसंगत बातों का स्वयं समाधान कर लिया गया है। संबंधित समूह की निविदा प्रक्रिया अंतिम हो जाने के पश्चात उसके द्वारा किसी भी प्रकार की कोई शिकायत/आपत्ति अथवा इस संबंध में न्यायालयीन वाद नहीं प्रस्तुत किया जायेगा। निविदा प्रक्रिया अंतिम होने के पश्चात् निर्धारित समयावधि में देय राशि का भुगतान करनें एवं औपचारिकताओं की पूर्ति करते हुए खदान संचालन हेतु सहमत है। यह करारनामा ऑनलाईन सहमति के रूप में लिया जावेगा। निविदाकार को परिशिष्ट–3 पर दर्शित ऑनलाईन करार/वचन /सहमति पत्र डाउनलोड, आवश्यक प्रविष्टियां कर एवं हस्ताक्षरित कर,

स्कैन प्रति डिजिटल साइनिंग सर्टिफिकेट के माध्यम से ऑनलाईन अपलोड करना होगा।

(ii) यदि समूह का प्रारंभिक आधार मूल्य (अपसेट प्राईज) रू. दस करोड़ से अधिक है, तो दिनांक 31.03.2019 की स्थिति में निविदाकार की Networth, समूह के प्रारंभिक आधार मूल्य (अपसेट प्राईज) के न्यूनतम 50 प्रतिशत के समतुल्य होनी अनिवार्य है। इस हेतु निविदाकार को सनदी लेखाकार (चार्टर्ड एकाउन्टेंट) द्वारा, वर्ष 2018–19 के अंकेक्षित लेखों (Standalone basis) के आधार पर, दिनांक 31.03.2019 की स्थिति में, जारी Certificate उपलब्ध कराना अनिवार्य होगा।

यदि वर्ष 2018–19 के लेखे Final फाइनल न हुए हों, तो ऐसी स्थिति में वर्ष 2017–18 के अंकेक्षित लेखों के आधार पर, दिनांक 31.03.2018 की स्थिति में Networth का उपरोक्तानुसार जारी प्रमाण पत्र मान्य होगा।

(iii) निविदाकार को ई–निविदा प्रस्तुत करते समय परिशिष्ट–4 अनुसार विवरण, यदि आवेदक व्यक्ति नहीं है, परिशिष्ट–5 में दर्शित प्रारूप अनुसार अधिकार पत्र (उचित मूल्य के नॉन ज्यूडिशियल स्टैम्प पेपर पर निष्पादित कर नोटराईज्ड किया जाना है) एवं परिशिष्ट–6 पर दिये गये स्थल भ्रमण के लिए घोषणा (उचित मूल्य के नॉन ज्यूडिशियल स्टाम्प पेपर पर) स्केन कर अपलोड करना होगा।

(ख) **<u>वित्तीय प्रस्ताव</u>** :– इच्छुक निविदाकार अधिकृत पोर्टल https://mptenders.gov.in पर ऑनलाईन वित्तीय प्रस्ताव प्रस्तुत (सबमिट) करेगा।

(ग) तकनीकी एवं वित्तीय प्रस्ताव मात्र ऑनलाईन मोड में ही सबमिट किये जावेंगे। किसी प्रकार की फिजिकल बिड मान्य नहीं की जावेगी। तकनीकी एवं वित्तीय प्रस्ताव एक साथ प्रस्तुत किये जावेंगे। एवं उनके खोले जाने की तिथि भी पोर्टल पर दर्शित होगी।

(घ) **<u>तकनीकी प्रस्ताव का मूल्यांकन</u>**– प्रथमतः तकनीकी बिड खोली जावेगी एवं मात्र ऐसे निविदाकारों के वित्तीय प्रस्ताव खोल जावेंगे जो कि वांछित तकनीकी अर्हता पूर्ण करते हो।

(vi) **<u>ई–निविदा में शामिल खदानों के समूहों का विवरण एवं प्रारंभिक आधार मूल्य (अपसेट प्राइज) का निर्धारण–</u>**

निविदा प्रपत्र के परिशिष्ट–1 में दर्शित सूची में ई–निविदा में शामिल रेत खदानों के जिलेवार समूह का विवरण है। साथ ही परिशिष्ट–1 में उनकी विक्रय योग्य वार्षिक मात्रा का उल्लेख है एवं उक्त उल्लेखित मात्रा एवं दर रू. 125/– प्रति घनमीटर का गुणनफल (जिलेवार विक्रय योग्य वार्षिक मात्रा x 125) उक्त समूह/जिला के लिये प्रारंभिक आधार मूल्य (अपसेट प्राइज) होगा।

(vii) **<u>ई.एम.डी. (अमानत राशि)</u>**

(क) पंजीकृत व्यक्ति/संस्था चाहे अनुसार एक से अधि समूह के लिए निविदा प्रस्तुत करनें हेतु पात्र होंगे एवं प्रत्येक समूह हेतु निर्धारित आधार मूल्य की 25% पृथक–पृथक ऑनलाइन ई.एम.डी. के रूप में निर्धारित खाते में जमा करने उपरांत ही निविदा में भाग ले सकेंगे/सकेगी।

(ख) उपरोक्तानुसार जमा की गई ई.एम.डी. की राशि, सफल निविदाकार के मामले में सुरक्षा जमा राशि के रूप में जमा रहेगी और ठेका अवधि के दौरान अनुबंध के निबंधन और शर्तो का सम्यक रूप से पालन करने एवं खदान के सफलतापूर्वक संचालन उपरांत ठेका अवधि की समाप्ति के पश्चात ही वापसी योग्य होगी। निम्न कंडिका ग अनुसार द्वितीय उच्चतम निविदाकार को छोड़कर शेष निविदाकारों की राशि यथास्थिति ऑनलाईन वापस की जाएगी।

(ग) निविदा प्रक्रिया हेतु समूह की निविदा तिथि एण्वं समय नियत रहेगा एवं नियत कालावधि का अवसान होने के पश्चात् किसी विनिर्दिष्ट समूह के लिए प्राप्त सभी निविदाएं, निविदा प्रपत्र में उल्लिखित तिथि के अनुसार खोली जाएंगी। प्राप्त निविदाओं में से

उच्चतम निविदाकार को निगम द्वारा सफल निविदाकार घाोषित करते हुए इसकी सूचना परिशिष्ट–7 में संबंधित कलेक्टर को देगा। इसके अतिरिक्त ऐसे द्वितीय उच्चतम निविदाकार जिसके द्वारा प्रस्तुत निविदा राशि का अंतर उच्चतम निविदाकार से 10 प्रतिशत से अधिक न हो, इसकी सूचना निगम द्वारा संबंधित कलेक्टर को भी दी जाएगी।

(viii) **<u>एकल निविदा</u>**

(क) निविदा प्रक्रिया में प्रथम आमंत्रण में किसी समूह विशेष की एकल निविदा प्राप्त होने पर उसे निरस्त किया जायेगा एवं खदान समूह की पुनः निविदा आमंत्रित की जाएगी।

(ख) किसी समूह की लगातार दूसरी अथवा तीसरी निविदा में एकल निविदा प्राप्त होती है एवं प्राप्त निविदा समूह हेतु निर्धारित आधार मूल्य से 10 प्रतिशत अधिक अथवा उससे अधिक हो तो ऐसे एकल निविदाकार को सफल निविदाकार घोषित किया जाएगा निगम द्वारा इसकी सूचना कलेक्टर को दी जाएगी।

(ग) किसी भी समूह की लगातार तीन बार निविदा प्राप्त न होने, नियत आधार मूल्य से कम निविदा प्राप्त होने पर, संचालक कारणों की जानकारी प्राप्त करेगा तथा समस्त ऐसे समस्त कार्य/उपाय जिसमें समूह का पुनर्गठन सम्मिलित है, किए जाएंगे जिससे उस समूह की रेत खदानों के लिए निविदा प्राप्त हो सके।

5. Furthermore, NIT contained various Annexures of which Annexure 5, 'Pradhikar Patra', which is relevant in the present matters was to be furnished only by Company/Partnership/Limited Liability Partnership (LLP) on non-judicial stamp paper of appropriate value. Annexure 5 is reproduced below for ready reference :

परिशिष्ट–5

प्राधिकार पत्र का प्रारूप

(उचित मूल्य के नॉन ज्यूडिशियल स्टैम्प पेपर पर निष्पादित कर नोटराईज्ड किया जाना है)

केवल कंपनी/साझेदारी फर्म/सीमित दायित्व भागीदारी (एलएलपी) द्वारा उपलब्ध कराई जाएगी।

हम ..... (नाम), पता .....(पंजीकृत कार्यालय का पता) :श्री/सुश्री (नाम) ..... आत्मज/आत्मजा/पत्नी ..... को दि. मध्यप्रदेश स्टेट माईनिंग कार्पोरेशन लिमिटेड (निगम) को.....रेत खदानों के समूह हेतु आमंत्रित निविदा में भाग लेने, अनुबंध निष्पादित करने तक प्रस्ताव और अन्य दस्तावेज और लेखन, प्रीबिड और अन्य बैठकों में भाग लेने और निगम को सूचना/प्रतिक्रिया देने, सभी प्रपत्रों/दस्तावेजों/आवेदनों पर हस्ताक्षर करने, निगम द्वारा आमंत्रित रेत समूहों की निविदा में हमारा प्रतिनिधित्व करने तथा हमारे प्रस्ताव की स्वीकृति के परिणामस्वरूप मध्यप्रदेश रेत (खनन, परिवहन, भण्डारण तथा व्यापार) नियम, 2019 के अंतर्गत सफल निविदाकार/ठेकेदार के रूप में अनुबंधनों और वचन पत्रों पर हस्ताक्षर और निष्पादन, और निविदा और/या हमारे प्रस्ताव के संबंध में, निगम/कलेक्टर/सरकार से निपटना आदि समस्त कार्यो के लिए, आज दिनांक से कलेक्टर के साथ अनुबंध में प्रवेश करने तक, हमारे नाम और हमारी तरफ से समस्त कार्यवाहियां संपादित करने के लिए एतद् द्वारा हमारे अधिकृत व्यक्ति के रूप में मनोनीत, नियुक्त और अधिकृत करते है।

और हम इस प्रकार पुष्टि करते हैं कि हमारे द्वारा अधिकृत व्यक्ति को प्रदान की गई शक्तियों के प्रयोग के दौरान और किये गये सभी कार्य, कर्मो और चीजों को कानूनी रूप से किया गया या हमारे द्वारा अधिकृत किये जाने के कारण और प्रदान किये गये

प्राधिकार पत्र के प्रयोग में अधिकृत व्यक्ति द्वारा किए गए सभी कृत्यों, कर्मो और चीजों को हमेशा हमारे द्वारा किया गया माना जाएगा।

साक्ष्य में हमने, ... के दिन, 2018 को .....

ऊपर नामित व्यक्ति को इस प्राधिकार पत्र पर निष्पादित करके अधिकृत व्यक्ति नियुक्त किया।

हस्ताक्षर
(नाम, शीर्षक, पता)

गवाह :–
1.
2.

नोट : प्राधिकार पत्र के निष्पादन के तरीका लागू योग्य, कानून व चार्टर दस्तावेजों में निर्धारित प्रक्रिया यदि कोई हो, के आधार पर होना चाहिए।

6. It is further revealed from material on record that as stipulated in NIT dated 05.10.2019, a pre-bid meeting was held on 15.10.2019 and 16.10.2019 to resolve queries and doubts raised by the prospective participants. As regards to doubts about the stamp duty to be affixed on "Pradhikar Patra", it was resolved to be executed on Rs.1000/- stamp paper.

7. It is also pertinent to note that NIT also contained Clause 27 which stipulated for correction in the tender documents before last date of submission of tender.

8. Petitioners submitted their online bids along with the relevant documents before last date which was extended from 08.11.2019 to 26.11.2019.

9. That, on 05.12.2019, these petitioners were informed that their bid for the tender for Sidhi/Singrauli group of sand quarry has been rejected during Technical evaluation by the duly constituted Committee and declared disqualified for financial bid opening for the reason that Annexure 5 has not been adequately stamped as per terms and conditions of a tender document and instruction. In case of Panna group of sand quarry, the petitioner was informed on 24.12.2019 that he is not qualified for financial bid opening for the reason abovementioned.

10. The rejection of bid is the cause for filing these petitions, seeking direction to quash the rejection order and direction for consideration of financial bid.

11. It be noted that in furtherance to acceptance of bid of the eligible persons, who are arrayed as private respondent in respective petitions, steps have been taken as stipulated in Rules 11, 12 and 13 of Rules of 2019, such as depositing of 50% amount of the highest tender amount, 25% whereof is the EMD, statutory permission which include mining plan, environmental clearance, water and air consent and the permissible quantity.

12. Be that as it may. Precise submission on behalf of the petitioners is that the stipulation as to appropriate stamp duty on 'Pradhikar Patra' being a non-essential ancillary condition, was a defect which being curable in nature, rejection of bid for a deficit stamp duty of Rs.900/- was not only illegal and arbitrary but is also contrary to public interest as the same has led to revenue loss of crores of rupees, because the petitioners' whose bid has been rejected is much higher than of the respondents whose offer has been accepted. Further contending that the terms and conditions of the tender can be essential and non-essential, it is urged that while the conditions essential are those which determines the eligibility of the party concerned and are inherent in nature; such as filing of 'Pradhikar Patra' by the Company/Partnership Firm/Limited Liability Partnership; whereas the condition that such 'Pradhikar Patra' be on an appropriate stamp duty being an ancillary condition is in the nature of non-essential condition, which being curable will not empower the respondent/M.P. State Mining Corporation Ltd. to reject the bid, which tantamount to be an arbitrary and irrational exercise of power which can be interfered with in a writ petition under Article 226 of the Constitution. It is further contended that an

aspect of deficit stamp duty since falls within the domain of revenue to the State and being curable under the Stamp Act, non-adherence to such corrective measures by the State, more particularly, when such non-rectification leads to revenue loss in crores, tantamounts to an arbitrary exercise of powers. Another contention raised on behalf of the petitioners, more particularly, the petitioner in Writ Petition No.26939/2019 is that of discrimination. It is urged that the bid of one Shri Vineet Bhargava who applied for Bhopal group of sand quarry with a 'Pradhikar Patra' on Rs.100/- stamp paper was duly accepted, whereas, the bid of the petitioners has been rejected. It is urged that the petitioners cannot be discriminated, therefore also, it is contended that, the rejection order is bad and deserves to be quashed. Petitioners, accordingly, seek quashment of the rejection order and a direction to the respondent/Corporation to open the financial bid and take steps thereon.

13. The respondents, on their turn, vehemently refute the contention that the affixation of appropriate stamp duty on the 'Pradhikar Patra' is a non-essential condition as could be waived of or allowed to be rectified. It is urged that, all the conditions stipulated in the tender document including the terms in Clause 5

and 6 were essential conditions and it was imperative and mandatory on the part of every bidder to have adhered to the terms and conditions of the tender. It is urged that, to alleviate any doubt in respect of terms and conditions of tender, pre-tender meeting was held on 15.10.2016 and 16.10.2016, wherein prospective bidders participated and after considering the queries and doubts, clarification was issued. It is urged that, as to the value of stamp duty on Annexure 5, which was a "Pradhikar Patra", it was clarified that the value of it would be Rs.1000/- stamp duty. Despite the clarification, it is contended that, the petitioners furnished the 'Pradhikar Patra' on Rs.100/- stamp duty. It is urged that though the petitioners had opportunity to rectify the mistake as per Clause 27, yet no effort was made to rectify the deficiency. It is contended that since the bids by the petitioners were not complete and defective, the same were rightly rejected. As regard to the contention of discrimination qua Shri Vineet Bhargava, it is urged that Annexure P-5 being applicable only to Companies/Partnership Concern/ Limited Liability Partnership and not to an individual who participated in the bid, furnishing of 'Pradhikar Patra' on Rs.100/- stamp paper by Shri Vineet Bhargava, an individual, was of no

consequences, because an individual is not required under any law to authorize himself to participate in the bid proceedings. As to the contention that because of the deficit of Rs.900/- stamp duty, the State suffered crores of public money because of the difference in bid amount offered by the petitioner and the highest bidder whose offer was accepted, it is contended that at the preliminary stage of scrutiny, no one knows as to whose bid is highest, what is important at this stage is, whether the contender fulfills the imperative terms and conditions stipulated in the tender document. A contender, it is urged, who does not fulfill the requisite and his candidature is rejected cannot later take any mileage of the bid amount because the same is of no consequences. It is further contended that the relief as sought by the petitioners, if acceded to at the stage when the agreement has been executed with the successful bidder, it will lead to restarting of entire process which will not be congenial to public interest, as the same may lead to fresh auction, resulting in price escalation which will be detrimental to public interest. On these contentions, respondents seek dismissal of petitions.

14. Catena of decisions were cited by both the parties to bring home their respective submissions, which we will dwelt with at appropriate stage.

15. Considered rival contentions and perused the material placed on record.

16. The issue which arises for consideration is, whether appropriate stamp duty on a 'Pradhikar Patra' can be an ancillary or non-essential condition, as would forbid the rejection of bid for its non-compliance. And, whether the respondent/M.P. State Mining Corporation Ltd. was justified in rejecting the candidature of the petitioners having deviated from affixing appropriate stamp duty.

17. Evidently, Clause 5 and 6 of the Tender Document (which is defined in Clause 3(iv) to mean **'निविदा दस्तावेज'** से तात्पर्य मध्यप्रदेश रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, 2019 तथा उनके अतंर्गत निष्पादित समस्त दस्तावेज, ई–निविदा आमंत्रण सूचना, ई–निविदा प्रपत्र एवं उसमें संलग्न/प्रदत्त दस्तावेज से है) respectively provides for presentation of e-Tender online, e-Tender procedure and the declaration of successful bidder. Sub-clause (क) of Clause 5 lays down technical qualifications that, the bidder is not bankrupt, no dues are outstanding relating to allotted mines and minerals, the bidder is not

blacklisted by the Mineral Department of State of Madhya Pradesh, the bidder should be a citizen of India, Registered Firm, LLP, Registered Society or Indian Company (any legal person). It further stipulates that if bidder is an individual, he shall furnish Aadhaar Card/PAN Card and if Partnership Firm, Company, Society or LLP shall respectively produce registration certificate issued by the Registrar, Firms and Society or other authorized agency, copy of Certification of incorporation issued by the Registrar of Companies, Registration Certificate under Societies Act or LLP Registration Certificate issued by the Registrar of Companies, as the case may be. And that, the bidder should have PAN from the Income Tax Department. That, sub-clause (v)(क)(i)(ii)(iii) of Clause 6 stipulates uploading of Technical Documents; viz. Online Agreement (Annexure 3), Net Worth Certificate as of 31.12.2019 issued by the Chartered Accountant and if the bidder is not a person (i.e. an individual), the details as per Annexure-4 and 'Pradhikar Patra' as per Annexure-5 (executed on the adequate value of non-judicial stamp and notarized). That, sub-clause (ख) of Clause 6 provides for submission of online financial bid. Furthermore, Sub-clause (ग) of Clause 6 lays down that Technical and Financial bid shall be

submitted online and that the physical bid shall not be accepted. And that both the bids to be submitted together and the date of their opening shall be displayed on portal. Furthermore, Sub-clause (घ) of Clause 6 stipulates that the technical bid will first be opened and the financial bid of only such bidders will be opened who qualify in Technical bid.

18. It is further borne out from Annexure P/1 (which is NIT dated 05.10.2019) in Writ Petition No.26939/2019 that a pre-bid meeting was arranged on 15.10.2019 and 16.10.2019 for clearing of doubts, stating therein:

<u>रेत खनिज की ई–निविदा सूचना</u>

मध्यप्रदेश राज्य खनिज निगम, मध्यप्रदेश शासन का उपक्रम है जिसे राज्य शासन ने प्रदेश में मध्यप्रदेश रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, 2019 अंतर्गत समूहवार रेत खदानों के निविदाओं के माध्यम से संचालन के लिये निविदायें आमंत्रित करने हेतु अधिकृत किया है। निगम विभिन्न समूहों के अनुसार रेत की खदानों के संचालन हेतु अधिसूचित की गई मात्रा (घनमीटर) में एवं आरक्षित मूल्य के आधार पर 05 वर्षो हेतु (30 जून 2022 तक) संचालन के लिये एन.आई. सी. के ऑनलाइन पोर्टल https://mptenders.gov.in के माध्यम से इच्छुक एवं पात्रता रखने वाले निविदाकारों से तकनीकी प्रस्ताव एवं निविदायें आमंत्रित करता है। प्रत्येक समूह की 25 प्रतिशत सुरक्षा निधि के साथ तकनीकी प्रस्ताव एवं वित्तीय निविदा जमा करने की अवधि 17 अक्टूबर 2019 से 08 नबम्बर 2019 अपरान्ह में 05:00 बजे तक रहेगी।

इच्छुक निविदाओं की शंकाओं के निराकरण एवं ऑनलाइन निविदा भरने की प्रक्रिया के संबंध में प्रशिक्षण एवं जानकारी का सत्र वीडियो कांफ्रेस के माध्यम से दिनांक 15.10.2019 को पूर्वान्ह 10:00 बजे से 12:00 बजे दोपहर तक एवं दिनांक 16.10.2019 को 02:00 बजे से 4:00 बजे अपरान्ह तक रखा जायेगा जो कि प्रदेश के सभी जिला मुख्यालयों में नियत स्थान पर आयोजित होगा। इसमें इच्छुक निविदाकार निःशुल्क भाग ले सकेंगे। निविदा की विस्तृत प्रक्रिया, समूहों का विवरण, अनुबंध का प्रारूप, विस्तृत शर्तें तथा प्रक्रिया का विवरण https://mptenders.gov.in के अरिरिक्त मध्यप्रदेश राज्य खनिज निगम की अधिकृत वेबसाइट www.mpsmcl.mp.gov.in तथा संचालनालय, भौमिकी तथा खनिकर्म के पोर्टल https://ekhanij.mp.gov.in पर दिनांक 08 अक्टूबर 2019 से उपलब्ध रहेगा। मध्यप्रदेश रेत (खनन, परिवहन, भण्डारण एवं व्यापार) नियम, 2019 भी उक्त वेबसाइट एवं खनिज साधन विभाग की बेवसाइट https://www.mineralresources.mp.gov.in पर उपलब्ध है, निविदा प्रक्रिया के संबंध में किसी भी प्रकार के संशय के निवारण हेतु ई–मेल info.mpsmc@mp.gov.in पर पृच्छा भेजी जा सकती है, साथ ही मध्यप्रदेश राज्य खनिज निगम के मुख्य कार्यालय पर्यावास भवन, द्वितीय तल स्थित कार्यालय में किसी भी कार्यालयीन दिवस में उक्त नम्बरों पर अथवा व्यक्तिगत रूप से संपर्क किया जा सकता है।

..... Emphasis supplied

19. It is not in dispute that a pre-bid meeting was held on 15.10.2019 and 16.10.2019, wherein as many as 26 queries/doubts were clarified and the clarifications were uploaded. One of the doubts raised was in respect of value of Stamp Duty to be affixed on Annexure-5, whereon it was made clear that value of Stamp Duty

on said Annexure-5 shall be Rs.1000/-. The decision is reproduced for ready reference :

> दिनांक 15.10.2019 एवं दिनांक 16.10.2019 को प्रदेश में रेत खनिज की निविदाओं के संबंध में इच्छुक निविदाकारों की शंकाओं के समाधान एवं पृच्छा के निराकरण के संबंध में प्रदेश के सभी जिला मुख्यालयों में वीडियो कान्फ्रेन्सिंग का आयोजन किया गया । वीडियो कान्फ्रेन्सिंग में पृच्छाओं पर स्पष्टीकरण उनके समक्ष दर्शित किये गये है –
>
> | क्र. | पृच्छा | पृच्छाओं का स्पष्टीकरण |
> |---|---|---|
> | 1 | निविदा प्रपत्र के परिशिष्ट–5 (प्राधिकार पत्र) पर कितनी स्टाम्प डियूटी देय होगी ? | परिशिष्ट–5 (प्राधिकार पत्र) रू0 1000 के स्टाम्प पेपर पर निष्पादित किया जाना होगा । अधिकृत हस्ताक्षरी द्वारा हस्ताक्षरित कर प्राधिकार पत्र जमा करना होगा । |

20. It is pertinent to note, and, not disputed by the parties that Clause 27 of the Tender provides for rectification of Tender Document before the last date. It states -

> **27. <u>निविदा दस्तावेजों में सुधार</u>**
>
> ई–निविदा की अंतिम तारीख के पूर्व निगम आवश्यकतानुसार निविदा दस्तावेजों में सुधार कर सकेगा जिसकी जानकारी संचालनालय भौमिकी तथा खनिकर्म म.प्र. के पोर्टल ekhanij.mp.gov.in, मध्यप्रदेश राज्य खनिज निगम के पोर्टल mpsmcl.mp.gov.in एंव एन.आई.सी के पोर्टल https://mptenders.gov.in में ही प्रदर्शित किये जायेगें । अतः इच्छुक निविदाकारों को सलाह दी जाती है कि वे इन बेवसाइट/पोर्टल्स को नियमित रूप से देखें ।

21. In view whereof, the ‘Pradhikar Patra’ with appropriate stamp duty was construed by the employer as an essential condition, therefore, it was clarified in pre-tender meeting held on 15.10.2019 and 16.10.2019 that it shall bear the stamp duty of Rs.1000/- and was made known to all the participants including the petitioners.

22. We are informed, during the course of hearing that besides the petitioners and successful bidders, there were other Companies, Partnership Firms and LLPs and except the present petitioners, all others had uploaded the ‘Pradhikar Patra’ with stamp duty of Rs.1000/-. Though total numbers of participants were also disclosed during course of hearing; however, since no such number of participants are pleaded, we refrain from adverting to the same. However, there is no dispute that besides the petitioners and the respondent, there were other bidders.

23. Be that as it may, the fact remains that with the clarification being made in pre-tender sitting as to the actual value of stamp duty (Rs.1000/-) on the ‘Pradhikar Patra’, there was no scope for any deviation from the terms. It being an essential condition.

24. In the matter of tender, the terms and conditions thereof has to be understood from the angle of the employer and that such

employer will be within his right to ensure the strict compliance thereof. In **G.J. Fernandez vs State of Karnataka (1990) 2 SCC 488**, it is held that "the employer has the right to punctiliously and rigidly enforce the terms of the tender". In **Puravankara Projects Ltd. vs Hotel Venus International (2007) 10 SCC 33**, it is held that "tender terms are contractual and it is the privilege of the Government which invites its tenders and courts do not have jurisdiction to judge as to how the tender terms should be framed.

25. In **Afcons Infrastructure Ltd. vs Nagpur Metro Rail Corpn. Ltd. (2016) 16 SCC 818**, it is held :

> "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."

26. Affixing of appropriate stamp duty on 'Pradhikar Patra', in our considered opinion, being an essential condition and the same

being not adhered to by the petitioners, nor the defect was rectified as per Clause 27, the respondent/M.P. State Mining Corporation Ltd was justified in rejecting the bid application of the petitioners at the threshold.

27. Much emphasis has been laid by the petitioners on the decisions in **Poddar Steel Corpn. vs Ganesh Engineering Works (1991) 3 SCC 273** and **Rashmi Metaliks Ltd. vs Kolkata Metropolitan Development Authority (2013) 10 SCC 95**, wherein it is held that deviation from non-essential or ancillary or subsidiary terms of an NIT and substantial compliance (as held in **Tejas Constructions & Infrastructure (P) Ltd. vs Municipal Council, Sendhwa (2012) 6 SCC 464)** of such terms will not be fatal, are of no assistance in the case at hand, as we find that the employer through their pre-tender meeting ensured that the 'Pradhikar Patra' must be on stamp duty of Rs.1000/- and thus, made it an essential condition.

28. In **Central Coalfields Ltd. vs SLL-SML (Joint Venture Consortium) (2016) 8 SCC 622**, it is held:

> "42. Unfortunately, this Court in *Poddar Steel* [*Poddar Steel Corpn.* v. *Ganesh Engg. Works*, (1991) 3 SCC 273] did not at all advert to the privilege-of-participation

principle laid down in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] and accepted in *G.J. Fernandez* [*G.J. Fernandez* v. *State of Karnataka*, (1990) 2 SCC 488] . In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in *Poddar Steel* [*Poddar Steel Corpn.* v. *Ganesh Engg. Works*, (1991) 3 SCC 273].

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in *Tata Cellular* v. *Union of India* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following *Tata Cellular* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651]) in *Jagdish Mandal* v.

State of Orissa [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

"*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 succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said: (*Jagdish Mandal case* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] , SCC p. 531, para 22)

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

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

or

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

(ii) Whether public interest is affected.

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

44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

45. Rashmi Metaliks [Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority, (2013) 10 SCC 95 : (2013) 4 SCC (Civ) 650 : (2014) 1 SCC (Cri) 43 : (2013) 2 SCC (L&S) 858] was a comparatively different case inasmuch as Clause (j) of NIT was the subject-matter of consideration. This clause required a bidder to submit "Valid PAN No., VAT No., copy of acknowledgment of latest income tax return and professional tax return". The employer interpreted this to be an essential term for qualifying in the bidding process. This view was upheld by a learned Single Judge [Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority, 2013 SCC OnLine Cal 11769] and the Division Bench [Rashmi Metaliks Ltd. v. K.M.D.A., 2013 SCC OnLine Cal 12769] of the Calcutta High Court. This Court reversed in the

following words: (Rashmi Metaliks case [Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority, (2013) 10 SCC 95 : (2013) 4 SCC (Civ) 650 : (2014) 1 SCC (Cri) 43 : (2013) 2 SCC (L&S) 858] , SCC p. 105, para 18)

"18. We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the appellant Company and if even thereafter no rectification had been carried out, the position may have been appreciably different."

Essentially therefore, this Court substituted its view for that of the employer who interpreted this term of NIT to be mandatory for compliance. Rashmi Metaliks [Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority, (2013) 10 SCC 95 : (2013) 4 SCC (Civ) 650 : (2014) 1 SCC (Cri) 43 : (2013) 2 SCC (L&S) 858] followed Poddar Steel [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] and apparently overlooked the dictum laid down in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] , G.J. Fernandez [G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488] , Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] and Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] and must be

confined to its own peculiar facts. In any event, this decision does not advance the case of any of the parties before us.

46. It is true that in *Poddar Steel* [*Poddar Steel Corpn.* v. *Ganesh Engg. Works*, (1991) 3 SCC 273] and in *Rashmi Metaliks* [*Rashmi Metaliks Ltd.* v. *Kolkata Metropolitan Development Authority*, (2013) 10 SCC 95 : (2013) 4 SCC (Civ) 650 : (2014) 1 SCC (Cri) 43 : (2013) 2 SCC (L&S) 858] a distinction has been drawn by this Court between essential and ancillary and subsidiary conditions in the bid documents. A similar distinction was adverted to more recently in *Bakshi Security and Personnel Services (P) Ltd.* v. *Devkishan Computed (P) Ltd.* [*Bakshi Security and Personnel Services (P) Ltd.* v. *Devkishan Computed (P) Ltd.*, (2016) 8 SCC 446 : (2016) 7 Scale 425] through a reference made to *Poddar Steel* [*Poddar Steel Corpn.* v. *Ganesh Engg. Works*, (1991) 3 SCC 273] . In that case, this Court held a particular term of NIT as essential (confirming the view of the employer) and also referred to the “admonition” given in *Jagdish Mandal* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber (India) Ltd.* v. *State of Karnataka* [*Michigan Rubber (India) Ltd.* v. *State of Karnataka*, (2012) 8 SCC 216] . Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and Personnel Services ineligible to participate in the tender.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber (India) Ltd.* v. *State of Karnataka*, (2012) 8 SCC 216] .

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential

bidders as held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court."

29. In view whereof, the petitioners are also not benefited by the decision in **Satish Chander Saxena v. Delhi Administration (2001) 59 DRJ 344** by Delhi High Court and the decisions in **Knowledge Infrastructure Systems Pvt. Ltd. vs Maharashtra Power Generation Co. Ltd. (2014) SCC OnLine Bom 885** and **Shri Vyankatesh Trading Company vs Food Corporation of India (2016) SCC Online Bom 6530** by the High Court of Bombay.

30. Furthermore, trite it is that the scope of interference in the matter relating to awarding of contracts by the Government or public undertaking is limited to the extent of decision making process. In **Master Marine Services (P) Ltd. vs Metcalfe & Hodgkinson (P) Ltd. (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. Further, in **Michigan Rubber (India) Ltd. vs State of Karnataka (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. In the cases at hand, evidently no such procedural irregularity in the decision making process is shown. In our considered opinion, non-acceptance of bid for non-compliance of essential condition cannot be termed to be a procedural irregularity.

31. In **Afcons Infrastructure Ltd.** (supra), it was 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. Furthermore, in **Montecarlo Ltd. vs NTPC Ltd. (2016) 15 SCC 272**, 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.

32. In **Siemens Aktiengeselischaft & Siemens Ltd. vs DMRC Ltd. (2014) 11 SCC 288,** it is held :

> "23. There is no gainsaying that in any challenge to the award of contract before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision-making

process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest."

33. In **Caretel Infotech Ltd. vs Hindustan Petroleum Corpn. Ltd. (2019) 14 SCC 81**, it is held :

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

38. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., this Court has expounded further on this aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. Mere disagreement with the decision making process would not suffice.

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

> “15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender

> documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

40. We may also refer to the judgment of this Court in Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr.,4 authored by one of us (Sanjay Kishan Kaul, J.). The legal principles for interpretation of commercial contracts have been discussed. In the said judgment, a reference was made to the observations of the Privy Council in Attorney General of Belize v. Belize Telecom Ltd. as under:

> "16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended…"
>
> * * *
>
> "19. ..... In Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
>
> "the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however

> desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

41. Nabha Power Limited (NPL) also took note of the earlier judgment of this court in Satya Jain (Dead) Through LRs. and Ors. vs. Anis Ahmed Rushdie (Dead) Through LRs. and Ors.7, which discussed the principle of business efficacy as proposed by Bowen, L.J. in the Moorcock8. It has been elucidated that this test requires that terms can be implied only if it is necessary to give business efficacy to the contract to avoid failure of the contract and only the bare minimum of implication is to be there to achieve this goal. Thus, if the contract makes business sense without the implication of terms, the courts will not imply the same.

42. The judgment in Nabha Power Limited (NPL)9 concluded with the following observations in para 72:

> "72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of

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

43. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."

34. In **Silppi Constructions Contractors vs Union of India (2019) SCC Online SC 1133**, it is held :

> "20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the

> state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. ..”

35. In **Sunflag Iron and Steel Co. Ltd. vs State of M.P**. **(2019) 1 MPLJ 689**, it is held :

> “15. … It is a decision taken by the Technical Evaluation and Tender Approval Committee, which is a committee of experts. Therefore, such decision taken by the experts cannot be interfered with while exercising writ jurisdiction of this Court, as this Court while exercising power of judicial review examines the decision making process and not the ultimate decision. ...”

36. Adverting to the facts of the present case, since the petitioners failed to adhere to essential condition, the rejection of their bid application thus cannot be faulted.

37. Further, the contention that with non-acceptance of petitioners’ financial bid which were higher than the bid of the respondent, the State has suffered a huge loss of crores to revenue and to earn

revenue being the primary aim of the State, this Court in larger public interest must cause an indulgence, deserves to be rejected. In **Sorath Builders vs Shreejikrupa Buildcon Ltd. (2009) 11 SCC 9**, it is held :

> "25. The prime consideration on which the High Court set aside the award of contract in favour of the appellant is that if the bid of Respondent 1 was considered in the tender process there would have been saving of public money. However, that would not in any manner justify in going through once again the same tender process, which is always time consuming. Any delay in awarding the contract would only mean increase in the cost of expenditure for cost of construction would go up with the passage of time."

38. Similarly, in **Raunaq International Ltd. vs I.V.R. Construction Ltd. (1999) 1 SCC 492**, it is held :

> "11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in

> public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

39. In view whereof, with the rejection of bid application for non-compliance of essential condition, petitioners cannot be granted second opportunity merely because their financial bid was higher. In **MHADA vs Shapoorji Pallonji & Co. (P) Ltd. (2018) 3 SCC 13**, it is held that where a bid submitted is not valid, any direction for reconsideration tantamount to a second opportunity which cannot be countenanced :

> "9. … the bid submitted by the first respondent was not a valid bid and the directions issued by the High Court in favour of the first respondent virtually confer on the said respondent a second opportunity, which cannot be countenanced."

40. Another contention that the petitioners are discriminated because while the bid of one Shri Vineet Bhargava who tendered the bid with a stamp duty of Rs.100/- on 'Pradhikar Patra' was accepted, whereas, of the petitioner, the same has been rejected, is taken note of and is rejected outright on the anvil of the fact that while the petitioners are Companies/Registered body for whom it

was imperative to have furnished the ‘Pradhikar Patra’ on Rs.1000/- stamp duty, an individual like Shri Vineet Bhargave was not under such obligation, because an individual is not required to authorize himself to represent, so even if he has filed a ‘Pradhikar Patra’, it was of no consequence, nor can there be any comparison between the petitioners and said Shri Vineet Bhargava.

41. As regard to contentions that the deficit stamp duty could have been made good under Chapter V of the Indian Stamp Act, 1899. Since we have held that the affixation of Rs.1000/- stamp duty on ‘Pradhikar Patra’ was a mandatory condition, which was not adhered to by the petitioners nor was rectified in the given time which led to rejection of bid at the threshold, the issue as to recovery of the deficit court fees to validate the instrument in question does not arise as it was never accepted.

42. In view whereof, since we find no merit in the challenge put-forth by the petitioners, petitions fail and are **dismissed**. No costs.

(Sanjay Yadav)
JUDGE

(B.K. Shrivastava)
JUDGE

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