

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS.1114 of 2016 & 718 of 2018**

Dr. R. Venkatesh,
Aged 45 years,
S/o. Late G. Ranganathan,
R/o. No.3B-8, L & L Odyssey,
Appts. Navelim, Margao,
Salcette, Goa.

.... Petitioner

V/s

1. State of Goa,
Through Chief Secretary,
Government of Goa,
Secretariat, Porvorim Goa.

2. Directorate of Health Services,
Government of Goa,
Campal, Panaji-Goa.

3. Apex Kidney Care,
Having R/o. at Fargo House,
Next to Spectra Motors,
Kachpada, Ramchandra Road Extension,
Malad (West), Mumbai City 400064.

4. NephroPlus Pvt. Ltd.,
Having R/o. at 1st floor,
West Wing, Punnaiah Plaza,
Above SBI Bank,
Near Jubilee Hills Check Post,
Road No.2, Banjara Hills,
Hyderabad, Telangana 500034.

5. Deep Chand Dialysis Centre,
Having R/o. at B-22 New Multan Nagar,
New Delhi 110056.

... Respondents

Ms. Gayatri Singh, Senior Advocate with Ms. Caroline Collasso and Ms. Ronita Bhattacharya, Advocates for the Petitioner.

Shri D. Pangam, Advocate General with Shri Deep Shirodkar, Additional Government Advocate for Respondents No.1 & 2.

Shri A.D. Bhobe, Advocate for Respondent No.3.

Shri S.D. Lotlikar, learned senior counsel as Amicus Curiae.

**Coram:- DAMA SESHADRI NAIDU &
NUTAN D. SARDESSAI, JJ.**

Date:- 5th MARCH 2020

ORAL JUDGMENT: (Per Dama Seshadri Naidu, J.)

Introduction:

The Government invites bids for establishing dialysis centres in the State of Goa. It fixes certain eligibility criteria for the bidders. An existing operator under the previous notification finds himself ineligible because of the new conditions. He assails the tender notification as tailor made with the objective of keeping him out of the reckoning and of helping a chosen candidate. He also complains that the Government has not complied with the Guidelines governing the government tenders.

Do these objections sustain themselves?

Facts:

2. One public spirited person filed PIL Writ Petition No.359/2007 thirteen years ago. He espoused the public cause on the premise that the Government-run hospitals were in a deplorable condition. So he wanted judicial intervention. Pending that writ petition, to support his contentions, the petitioner in PIL WP No.359/2007 secured and filed a third party's affidavit. That affidavit affirms the allegations in the writ petition. That third party—Dr. R. Venkatesh—is the petitioner before us. He, in fact, filed two writ

petitions: WP No.1114/2016 and WP No.718/2018.

3. The first Writ Petition—PIL WP No.359/2007—concerns larger public issues, and this Court has already appointed a learned senior counsel as the amicus curiae to assist the Court. We reckon that Writ Petition needs separate adjudication. Therefore, in this disposition, it is not touched.

4. Dr. R. Venkatesh, who gave his affidavit in PIL WP No.359/2007, has his own private grievances. Those grievances have engendered these two writ petitions. Having heard the respective counsel for the parties extensively, we propose to dispose of both these Writ Petitions—WP No.s1114/2016 and 718/2018—through this common judgment.

WP No.1114 of 2016:

5. We may set out in brief the factual background that has led Dr. Venkatesh to file this writ petition. In 2004, the Government decided to run a dedicated dialysis centre as a pilot project. Then, it assigned that task to Dr. Venkatesh, who is a qualified doctor. In 2007, he was asked to run another centre, too. He is said to have run both the dialysis centers successfully till 2012. Then in 2013, the Government decided to open those centres across the State. For that it floated a tender.

6. According to Dr. Venkatesh, until 2012 he ran both the dialysis

centres successfully, and the officials concerned had no grievance. But in 2012 Dr. Venkatesh gave an affidavit to support the PIL Writ Petition No.359/2007. Then, that spelt trouble to Dr. Venkatesh. The officials went on a rampage, creating many troubles to him. Besides, the Government issued a fresh tender notification, calling for bids for operating the dialysis centres in all hospitals, including those Dr. Venkatesh had been running.

7. In this writ petition, Dr. Venkatesh wants the Court to quash the tender notification, dated 31 October 2016, published in local newspapers on 2 November 2016 and to stay the impugned tender notification until the writ is decided.

WP No.718/2018:

8. In one breath, Dr. Venkatesh has pleaded that the contract he had with the Government in 2007 specified no time limit for the centres he had established. In another breath, he complains that the tender notification flouts the norms fixed by the Government, including the CVC. Pending WP No.1114/2016, he has filed the second one: WP No.718/2018. In this writ petition, Dr. Venkatesh narrates the harassment and the violence the officials have subjected him to, in the wake of his support to the public cause in PIL Writ Petition No.359/2007. In this writ petition he seeks these reliefs: To direct the authorities to immediately restore the electricity to the petitioner's

dialysis unit; to order judicial inquiry into the fire incident at the dialysis unit and to reconnect the inverter for the dialysis unit; to direct the Government to pay Rs.25 lakh to the petitioner for the lost consumables and medicines in the fire; to direct the officials concerned to deploy necessary security personnel for ensuring the safety of the dialysis patients, the staff, and the equipment/consumables.

Submissions:

Petitioner:

9. In the above factual matrix, Ms. G. Singh, the learned Senior Counsel, has essentially raised these aspects: (i) the tender notification violates the norms fixed for floating the government tenders; (ii) the Government has fixed the turnover in the tender notification only to ensure that Dr. Venkatesh would be disqualified; it is said to be a tailor-made criterion; (iii) the Government floated the tender when the contract with Dr. Venkatesh was subsisting, and that was without notice to him; (iv) the impugned tender notification does not contain the full Schedule I, as the 2005 tender notification did; with this change, many essential items are left out, and they have to be purchased from outside; (v) the left out essential items like Erithropoietin and iron sucrose injections, as well as CAPD fluids, add to the poor patients' costs; (vi) Goan Government Hospitals have been fully equipped to treat all the dialysis needs; the floating of tender is a wasteful exercise;

(vii) and that there was no pre-bid meet.

10. Indeed, the learned Senior Council has also elaborated on the *mala fides* supposedly displayed by the officials. But no official has been arrayed *eo nomine* to the writ petition. So we need not labour on that aspect.

11. To support her contention, the learned Senior Counsel has relied on *Maa Binda Express Carrier & Anr. v. North-East Frontier Railway & Ors.*¹, *Michigan Rubber (India) Ltd. v. State of Karnataka & Ors.*² *Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors.*³

Respondents:

12. Shri Devidas J. Pangam, the learned Advocate General, has first clarified on the aspect of the price, that is the burden on the dialysis patient. According to him, the injection Dr. Venkatesh has been harping on is anyway provided to all the patients under Mediclaim scheme—free of cost. Its cost, thus, is not a factor to be reckoned. About the alleged violation of the norms for the tender notification, he has submitted that there is no violation. At any rate, the learned Advocate General stresses that the CVC circular applies only to consultants. In the alternative, he has submitted that the circulars are mere guidelines; they are directory. In this context, the learned

¹(2014) 3 SCC 760

²(2012) 8 SCC 216

³(1999) 1 SCC 492

Advocate General has invoked the doctrine of substantial compliance.

13. The learned Advocate General has submitted that initially the tender notification was issued and kept in the public domain. There was a pre-bid meeting, too. Later, the Government realised that it had not published the tender in the newspapers as required. Then, it cancelled the earlier notification and, within a week, that is on 31.10.2016, issued a fresh tender notification. It was only a technical compliance. At any rate, as no new bidder came forward, the Government continued with the pre-bid meeting under the previous notification. Thus, the Advocate General insists there is no violation; if there were any, they were minor and inconsequential. The tender, according to the learned Advocate General, represents public interest.

14. Shri Pangam has denied that the Government has issued a tailor-made tender notification to exclude Dr. Venkatesh. He has submitted that the CVC guidelines themselves provided for the minimum turnover criterion. About the judicial intervention in contractual matters, the learned Advocate General has relied on *Municipal Corporation, Ujjain v. BVG India Limited*,⁴ *Directorate of Education v. Educomp Datamatics Ltd.*⁵ *Jitesh Ghewarchand Jain v. State*

⁴(2018) 5 SCC 462

⁵AIR 2004 SC 1962

of Goa,⁶ and *Mega Enterprises v. State of Maharashtra*.⁷

15. Shri Pangam then has drawn our attention to the schedule. According to him, the notification under which the petitioner established the dialysis centres and the impugned notification contained the same Schedule. He has also submitted that pending the Writ Petition the government finalized the tender and awarded the contract to the third respondent. But the petitioner has not chosen to challenge that award of the contract to the third respondent, at least by amending this writ petition.

Reply:

16. In reply, Ms. Singh, the learned Senior Counsel for the petitioner, has again elaborated on the services extended by Dr. Venkatesh and the discrimination the Government is said to have meted out to him. According to her, the CVC guidelines are essential, and their non-compliance vitiates the tender notification. So, Ms. Singh urges this Court to allow the Writ Petition.

Discussion:

17. The facts are not in dispute. In 2004, the Goan Government wanted to establish a dialysis centre through qualified third parties. It was to supplement the services rendered by the Government hospitals. That third-party operator would be compensated for the services he

⁶MANU/MH/2664/2019

⁷AIR 2007 Bom 156

extended. In 2004, experimentally, it chose Dr. Venkatesh and asked him to run one dialysis centre. So he established a centre and started running it successfully. Later, in 2005, the Government floated a tender to open another dialysis centre. In 2007, Dr. Venkatesh secured the second centre too.

18. In 2007, one public spirited person filed PIL WP No.359/2007. And in 2012, Dr. Venkatesh gave him an affidavit attesting to the facts alleged in that PIL. So Dr. Venkatesh claims that ever since the day he had given the affidavit, the health officials have been harassing him. Of course, that alleged harassment has led to Dr. Venkatesh's filing WP No.718/2018. But before that, in 2016, the Government floated a tender calling for bids from qualified, interested persons to run dialysis centres accross the State of Goa. The tender traces its origin to the National Health Mission Programme for Dialysis issued by the Ministry of Health and Family Welfare, Government of India. It was under the National Health Mission.

19. In WP No.1114/2016, Dr. Venkatesh alleges that the Government issued this notification to shut him out of the business, though his contract has still been subsisting. Besides, he alleges procedural violations in the Government's issuing the notification.

20. In the light of those allegations, let us examine these issues:

(1) What is the scope of judicial intervention in non-statutory contractual matters?

(2) Has the Government issued the tender notification, dt.31.10.2016, tailor-made to disqualify Dr. Venkatesh or to favour a chosen contractor?

(3) Has the Government violated the guidelines governing the award of public contracts?

Issue No.1: Judicial Intervention in non-statutory contractual matters:

21. Indeed, Dr. Venkatesh has been, at the Government's invitation, running two dialysis centres at the Government Hospitals: one from 2004, without a tender notification; the other from 2007, under a 2005-tender notification. Later, the Government came out with a fresh tender notification. That was in 2016. True, the contract the Government entered into with Dr. Venkatesh specified no time frame. At the same time, the petitioner too has not insisted that his contract with the Government is perpetual.

22. To that extent, we need not revisit the issue. We take that the Government has issued the tender notification legitimately calling for fresh bid for running dialysis centres across the State including the hospitals where the petitioner has been running the centre. The focal point could be only on whether the notification has answered the legal requirement or complied with those requirements. To begin with, Dr. Venkatesh never participated in the tender process because he could not meet the turnover criterion. In the above context, we should examine to

what extent this Court can judicially review the tender process.

23. In *BVG India Limited*, quoting with approval its earlier pronouncements, the Supreme Court has held that while exercising the powers of judicial review over the contracts the State has entered into, the Court is concerned primarily with whether there has been any infirmity in the “decision making process.” That is, the purpose of judicial review is to ensure that the individual receives fair treatment but not to ensure that the authority, after according fair treatment, awarded the contract correctly as was perceived by the Court. With its inherent limitations, the Court can only examine whether the “decision-making process” was reasonable, rational, and non-violative of Article 14 of the Constitution.

24. In *B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd.*⁸, the Supreme Court has summarised the scope of judicial review and the interference of superior courts in the matters of awarding contracts. It has, first, acknowledged the expansive role of the superior courts in judicial review. Then, it has enumerated the principles of judicial intervention:

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

⁸JT 2006 (10) SC 131

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

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

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

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”⁹

25. In *Maa Binda Express Carrier*, the respondent Railways floated tenders and invited bids for leasing out space (parcel van). But, later, it cancelled the tender notification. It was on the premise that the tender forms contained no terms. Besides, even the “all-important penalty clause”, too, had been missing. When one bidder assailed the cancellation, the Supreme Court has held that in awarding contracts, the Government and its agencies should always act reasonably and fairly. To that extent the tenderer has an enforceable right. That is, the

⁹As quoted in *BVG India Limited*

Court is competent to examine whether the aggrieved party has been treated unfairly or discriminated against, to the detriment of public interest.

26. In *Michigan Rubber (India) Ltd.*, the Supreme Court has held that, to judicially review the tender or contractual matters, the Court should pose to itself these questions: (i) Is the process adopted or decision made by the authority is *mala fide* or intended to favour someone; or is it so arbitrary and irrational that the court can say that "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" it?; and (ii) is the public interest affected? If the answers to the above questions are in the negative, then there should be no interference under Article 226.

27. In *Raunaq International*, the Supreme Court stresses that 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 there is some element of public interest involved in its entertaining that writ petition. It has stressed that if the decision has been taken *bona fide* and a choice has been exercised on legitimate considerations and not arbitrarily, the Court should not entertain a petition under Article 226. That is, the Court must carefully weigh conflicting public interests.

28. According to *Raunaq International*, if there is an allegation of

mala fides or an allegation that the contract has been entered into for collateral purposes, and if the court is satisfied on the material before it, only then will the allegation need further examination. And then the court could entertain the writ petition. *Raunaq International*, however, stresses on the inadvisability of interim stays in the contractual disputes.

29. To conclude, we may note that (i) essential tender conditions must be adhered to; (ii) relaxation is permissible if the offeror has such power; (iii) if there is a deviation, it must be across the board, to the benefit of all concerned; (iv) if the authorities find that the bidder has substantially complied with the essential tender conditions, the rejection of the offer is unwarranted; and (v) in the award of the contract and in the judicial scrutiny of those awarded contracts, public interest must be the prime factor.

Issue No.2:

Has the Government issued the tender notification, dt.31.10.2016, tailor-made to disqualify Dr. Venkatesh or to favour a chosen contractor?

30. One of the tender conditions is that “the principal bidder/lead partner shall have an average turnover of Rs.10.00 crores per annum in last three financial years. According to Dr. Venkatesh, the 2005-notification had an eligibility criterion of five-year experience, with no turnover condition attached to it. In this context, he stresses

that no bidder in a small state like Goa could ever meet the turnover criterion. Besides, he stresses that the reduced period of experience has been brought in only to suit “certain contenders.”

31. In fact, the National Health Mission has issued draft “Tender Enquiry Document for Provision of Dialysis Facility at District Hospital” to be adopted by the Department of Health & Family Welfare of every State Government. Condition 8 of the Eligibility Criteria speaks of the 10-crore turnover. First, we will deal with the turn-over criterion. Indisputably, the National Health Mission’s draft guidelines do contain that eligibility criterion. Dr. Venkatesh argues that a huge state like Uttar Pradesh has brought the turn-over criterion to four or five crores. So a small state like Goa ought not to have gone ahead with the eligibility criterion unaltered; it ought to have scaled down. Let us accept that the State of Goa could have—even ought to have—brought it down. That said, law does not concern itself with what ought to be; it concerns itself with what should be and what must not be. Law speaks of prohibitions, not of possibilities. Possibilities are policy prerogatives, and prohibitions are legal imperatives.

32. So long as law does not prohibit the State from choosing one of many alternatives as an eligibility norm, Courts cannot interfere with the State’s discretion. The only limit on that discretion is that the administrative action must not have been actuated by *mala fides*. Here,

we see none. Policy decisions, trite to note, are immune from judicial scrutiny save under exceptional circumstances. The same reasoning applies to the State's reducing the experience period from five years to three years.

33. Nexus test is not an iron-clad constitutional theory even in the sphere of equality or non-arbitrariness, the twin facets of Article 14 of the Constitution. Any fanatical adherence to this malleable theory may stifle policy experimentation and, even, growth. In *Comparative Constitutional Law*¹⁰, Prof. Mahendra P. Singh quotes from Professor Tripathi's *Telang Lectures* on the nexus theory. According to Prof. Tripathi, the nexus test is not at all suited for the situation where the statute indicates the policy or purpose to be fulfilled and also the special treatment to be given to the selected persons or things, but leaves it to the executive to make the actual selection of the persons or things in fulfillment of the legislative policy. Equally, he says, the nexus test is not suited to one person statutes or to statutes where "the legislature may give a broad indication of the kind of cases to be subjected to the differential treatment," or to statutes which leave the executive "entirely free to pick and choose individuals towards the fulfillment of the policy.

34. In *Educomp Datamatics Ltd.*, the Supreme Court has reiterated what it has held in *Monarch Infrastructure (P) Ltd. v. Commissioner*,

¹⁰EBC., 2nd Ed., Pp.783-84

*Ulhasnagar Municipal Corporation*¹¹. The Government prescribes terms in the tender, bearing in mind the nature of contract. In the contractual matters, the authority calling for the tender is the best judge. It is not for the courts to say whether the conditions prescribed in the tender are better than the ones prescribed in the earlier tender invitations. That is, the terms of the tender are not open to judicial scrutiny, for they are in the contractual realm. So the government must have a free hand in setting the terms of the tender; it must have a reasonable play in its decisional joints as a necessary concomitant in its administrative sphere. Then, it stresses that the courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.

35. In *S.S. & Co. v. Orissa Mining Corpn. Ltd.*¹², the Supreme Court has held that the Government [in that case, the Corporation] is the best judge of its interests and needs. And it is always open to it to suitably modify or change the eligibility criteria so as to best serve its purposes. Whenever a change is introduced in the eligibility criteria either by introducing some new conditions or restricting or altogether doing away with certain previous concessions, it might hurt the interests of someone or the other, but only for that reason the change(s) made in the eligibility criteria cannot be labelled as *mala fide*.

¹¹JT 2000 (6) SC 560

¹²(2008) 5 SCC 772

36. *Monarch Infrastructure* emphasises that the Government may have pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fairer, wiser, or more logical.

37. In *Jitesh Ghewarchand Jain*¹³, the basic challenge was about the terms of the tender to run a medical store on contract basis at the Goa Medical College. The petitioners have alleged that the Government stipulated the terms relating to experience and annual turnover only to kill competition and render ineligible several persons or entities otherwise eligible. After referring to the precedential position, a learned Division Bench of this Court has held that the tender “conditions, per se, do not suggest that they have no nexus whatsoever with the requirement of establishing a medical store at the GMC complex.” Eventually, *Jitesh Ghewarchand Jain* has considered all the aspects and held that the requirement of 5 years’ experience or of annual turnover of 50 crores was neither arbitrary nor unreasonable. According to it, given the limited scope of interference, the petitioners have not made out any case for the Court to strike down the tender conditions.

38. In *Tata Cellular v. Union of India*¹⁴, the Supreme Court has held that judicial quest in administrative matters is to find the right

¹³WP Nos.170 & 483 of 2018, decided on 16th September 2019.

¹⁴(1994) 6 SCC 651

balance between the administrative discretion to decide matters whether contractual or political or issues of social policy; “thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.” According to *Tata Cellular*, it is not for the Court to determine whether a particular policy or particular decision taken to fulfil that policy is fair. The Court is only concerned with the way those decisions have been taken. The extent of the duty to act fairly will vary from case to case, though.

39. *Tata Cellular*, in the end, quotes with approval Prof. Wades to reiterate that “the doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision.” Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. Decisions which are extravagant or capricious cannot be legitimate, But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. Finally it holds that "with the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."

Tailor-Made Conditions:

40. In *Mega Enterprises*, one of the arguments was that the

tender condition was tailor-made; it was to suit only the fourth respondent. The condition now incorporated was not found in the previous years. Then, a learned Division Bench of this Court accepted that the tender notifications of the previous years did not contain the impugned condition. But it has held that “this year the authorities, in their wisdom, thought it fit to impose certain eligibility conditions.” And merely because the fourth respondent “happens to be one who is eligible, it cannot be urged before [the Court] that this is a condition which is a tailor-made condition to suit” only the fourth respondent. According to it, the allegations of malice or *mala fides* are extremely weak, and the impugned condition could not be struck down based on the mere pleadings.

41. Further, in *Maa Binda Express Carrier* the Supreme Court has held that the participating bidders are entitled to only a fair, equal, and non-discriminatory treatment in the matter of evaluation of their tenders. Besides, as fairly well-settled, awarding a contract is essentially a commercial transaction which must be determined based on the considerations relevant to that commercial decision. That is, the tender conditions “are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers.” Indeed, *Maa Binda Express Carrier*, relied on by the petitioner, also stresses that “the authority inviting tenders can enter

into negotiations or grant relaxation for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

42. So, here too, on facts, we cannot but hold that the conditions have not been tailormade to oust Dr. Venkatesh or to favour a third party.

Issue No.3:

(c) Has the Government violated the guidelines governing the award of public contracts?

43. Dr. Venkatesh has maintained that the officials have violated many a tender norm, a case in point being not adhering to pre-bid consultation. He has also pointed out that the Annexure to the tender document left out certain items which, ultimately, add to the patient’s financial burden. For the Court to address them, Dr. Venkatesh must have been the aggrieved person. That is, he must have been otherwise eligible to be a bidder and these violations must have affected his prospects as a bidder.

44. That said, evidently, Dr. Venkatesh has not met one of the eligibility criteria: the turnover norm. So the rest of contentions, say about the procedural violations, remain outside the reckoning for him. He lacks the standing on that count.

45. *S.S. & Co. v. Orissa Mining Corpn. Ltd.*¹⁵, two appellants

¹⁵(2008) 5 SCC 772

questioned two different clauses of the eligibility criteria in the tender notification. They alleged that those two clauses were designed to exclude them from consideration. When the matter reached the Supreme Court, it has noted that the appellants did not satisfy the eligibility criteria regarding experience even in terms of the unamended Clause. Had the appellants been qualified in terms of the unamended clause and faced exclusion only because of the amended clauses, it might have been open for them to assail the amendment. But that was not so. Therefore, all arguments either based on the alleged *mala fides* or on the substance of the amendment lose their relevance.

46. True, even a stranger or an qualified person, as was held in *R.D.Shetty v. International Airports Authority of India*¹⁶, could have had the standing to question the tender conditions. But what has been questioned must have disabled that person from participating in the bid. Sans what has been assailed, if the person still remains unqualified, unless the challenge is *pro bono publico*, the Court will not entertain his plea on the grounds of standing. Relaxed and expansive as the concept of standing in public law remedy is, it still has some role to play. In *R. D. Shetty* the appellant pointed out that the eligibility criteria were relaxed later. Had he known that, he too would have applied. That is how he claimed the violation of right to equality.

¹⁶AIR 1979 SC 1628

47. Yet let us examine whether the respondents have violated the tender conditions or have breached the procedural parameters. First, Dr. Venkatesh insists there was no pre-bid meeting. According to him, CVC guidelines do make it mandatory. First, this plea, as we have noted earlier, remains unavailable for Dr. Venkatesh. That said, let us see the explanation the respondents provided on that count. Initially the respondent officials issued the tender notification and received bids in response. True, Dr. Venkatesh did not give his bid, for he was unqualified. Among the three bidders, there was a pre-bid meeting. Later, the Government realised that it had not published the tender in the newspapers as required. Then, it cancelled the earlier notification and, within a week, that is on 31.10.2016, issued a fresh tender notification. It was only a technical compliance. At any rate, as no new bidder came forward, the Government continued with the pre-bid meeting under the previous notification. Thus, the respondents insist there was no violation. If there were any, it was minor and inconsequential. The tender, according to them, represents public interest.

The Doctrine of Substantial Compliance:

48. At the forefront, we must accept that the doctrine of substantial compliance, an equity principle, applies only in the contractual sphere; it does not dispense with statutory requirements.

True, even contracts are, usually, governed by statutory stipulations. That said, no statute expects rigid, literal compliance as if the people were automatons tasked to comply with the legislative or administrative mandate to a T, so to say. No statute is impenetrable; it has its own crevices. Every statute allows a play in the joints. Law is no ritual to shut out all discretion; it is a matter of interpretation, understanding, and application—purpose oriented. For this reason, the courts have maintained a dichotomy of the statutory compliance: essential and inessential observances.

49. In *Montecarlo Ltd. v. NTPC Ltd.*¹⁷, the Supreme Court has extracted a part of the tender notification that concerns the Techno-Commercial Proposals. Those proposals very succinctly summarise what amounts to a material deviation from a tender condition: a deviation (i) that affects in any substantial way the scope, quality, or performance of the contract; (ii) that limits in any substantial way, inconsistent with the bidding documents, the Owner's rights or the successful Bidder's obligations under the contract; or (iii) whose rectification would unfairly affect the competitive position of other bidders who are presenting substantially responsive Proposals. This enumeration puts in perspective what is or is not substantial compliance.

50. In *B.S.N. Joshi & Sons Ltd.*, a special committee was
17JT 2016 (10) SC 229

constituted to scrutinise the tender document submitted by all the bidders. The Scrutiny Committee recorded that the appellant substantially complied with all the essential conditions. As we have already noted, the Supreme Court has held that when an appropriate authority decides after considering the tender document submitted by all the tenderers and ultimately finds that the successful bidders have, in fact, “substantially complied with the purport and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.”

51. In *Jal Mahal Resorts (P) Ltd. v. K.P. Sharma*¹⁸, the Supreme Court has quoted with approval *B.S.N. Joshi & Sons Ltd.* It has held that when there is substantial compliance with the terms of tender, the Government is entitled to waive any non-essential term in the tender for the *bona fide* reasons and in public interest. To conclude, the Court has held that if there were no *mala fides* in the decision-making process, literal compliance cannot be insisted upon.

The Fringe Objections:

52. Indeed, Dr. Venkatesh has been providing the dialysis along with a particular injection to the patients. Now the impugned tender, he insists, does not include that injection, though there has been little variation in the price quoted. That means, the services under the new

¹⁸(2014) 8 SCC 804

tender would be costlier or more burdensome to the patient. But the respondent officials maintain that the State supplies that injection free of cost to whoever needs it. So, first, Dr. Venkatesh is not right in contending that he has been providing it at his own costs, but not the successful bidder under the impugned tender. Second, no patient suffers any burden for the entire treatment, including the injection, is free.

53. Dr. Venkatesh also insists that the schedule to the tender notification has left out certain items of treatment. So the contractor is not tasked to supply them; then, either the Government or the patient bears the brunt. Again, the respondents counter this plea. They maintain that the items, if any, not listed in the Schedule do not add to the cost factor; they are, like the injection, are freely supplied.

54. Viewed from any perspective, we fail to find substance in Dr. Venkatesh's objections to the tender notification. So we dismiss the writ petition.

WP No.718 of 2018:

55. Indeed, in this Writ Petition the allegations are grave. The petitioner, a doctor, successfully running the dialysis centres for years, accuses the officials of violence and vandalism—even arson. The learned Senior Counsel for the petitioner informs the Court that though the crime has been registered, even the Police have not been diligent enough to bring to book the culprits of the crime. We must say the

allegations are disturbing.

56. The learned Advocate General, on the other hand, has put the blame on Dr. Venkatesh. According to him, it is Dr. Ventesh that indulged in violence. When queried about the injuries Dr. Venkatesh sustained and his, it seems, hospitalisation with broken bones, the learned Advocate General clarifies that in a commotion the Doctor tripped, fell, and sustained injuries. Sad, whatever be the explanation.

57. That said, the Writ petition confines itself to the relief of restoration of power supply and other amenities, besides compensation, perhaps as a matter of constitutional tort, for the loss and suffering the officials allegedly inflicted on him. Therefore, we cannot take cognizance of the allegations the learned Senior Counsel for the petitioner set out before us. Given the decision we have rendered a WP No.1114 of 2016, this Writ petition requires no separate adjudication. Suffice it to say that the petitioner may approach an appropriate forum and establish his claim for compensation if legally advised. Besides, if the petitioner has already registered a crime, we are sure, and anyway urge, the Police and the connected officials to act promptly.

Result:

58. We dismiss the Writ Petition No.1114 of 2016 as devoid of any merit; we close the Writ Petition No.718 of 2018 as having become inconsequential because of the decision in Writ Petition No.1114 of

2016.

No order on costs.

NUTAN D. SARDESSAI, J. **DAMA SESHADRI NAIDU, J.**
NH