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

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Date of Decision: 10.08.2021

% **W.P.(C) 4757/2021 and CM Nos. 14641/2021, 14643/2021 & 15546 - 15547/2021**

KANTI COMMERCIALS PRIVATE LIMITED Petitioner

Through: Mr. Jayant K. Mehta, Senior Advocate with Mr. Ashok Kumar Jain, Mr. Pankaj Jain, Advocates.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Chetan Sharma, Ld. ASG with Mr. Vikram Jetly, CGSC, Mr. Vinay Yadav, Mr. RV Prabhat, Mr. Akshay Gadeock, Mr. Sahaj Garg, Mr. Amit Gupta, Advocates for UOI.
Mr. Aditya Shankar Prasad, Mr. Sameer Kumar, Mr. Shah Rukh Ahmad, Mr. Mandeep Baisala, Advocates for respondent No. 3.
Ms. Bani Dikshit, Mr. Prashant Rana, Mr. Krishan Kumar, Advocates for respondent No. 4.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

VIPIN SANGHI, J. (ORAL)

1) The present petition has been preferred by the Petitioner assailing the communications issued by the Respondent No. 3 on behalf of Respondent

No. 1 and 2 vide emails dated 06.03.2021 and 15.03.2021, as well as the decision/order pursuant to which the above two emails were sent, rejecting the Petitioner's Expression of Interest in respect of the Preliminary Information Memorandum (PIM) published by Respondent No.2 department for inviting the Expressions of Interest (EOI) for the strategic disinvestment of Respondent No.4 Company i.e. Air India Limited by way of transfer of management control and sale of 100% equity share capital of the Respondent No.4 held by Government of India including Respondent No.4's shareholding interest of 100% in (i) Air India Express Ltd. And (ii) 50% in Air India SATS Airport Services Pvt. Ltd.

2) The PIM provides the 'Eligibility Criteria' in Clause 11 thereof. For our purpose, we may quote Clause 11.2 and Clause 11.3 which deal with 'Financial Capability' in the PIM and reads as follow:

"11.2 Financial Capability: For submitting the EOI and for being considered for subsequent qualification for Stage II of the Proposed Transaction, the IB (whether a sole bidder or a Consortium) shall satisfy the following criteria:

Net Worth: A minimum Net worth of INR 35,000 Mn (INR 3,500 Crore) computed in terms of Clause 11.3 and 11.4.

OR

ACI – A minimum ACI of INR 35,000 Mn (INR 3,500 Crore) computed in terms of Clause 11.3 and 11.4.

Note: Certain special dispensation in respect of Scheduled Airline Operator in India, for manner of satisfying the Financial Capability requirement, are set out in clause 11.3.(b)(ii) and 11.6.(c) below."

"11.3 Financial Capability shall be calculated as follows:

a) Net Worth means the aggregate value of the paid-up

equity share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet. Provided that for determining the Net Worth, any reserves created out of revaluation of assets, write-back of depreciation and amalgamation, intangible assets, redemption reserves, reserves made for any specific purpose shall not be included. Such methodology shall be applicable even to entities that are not incorporated in India (“Net Worth”).

.....

b) Apart from the Net Worth criteria as set out under 11.3 (a), IBs may also qualify on the basis of:

(i) In case of Funds,

(ii) IB, other than Funds, may also qualify on the basis of Net Worth of its Affiliate, provided such IB itself has a positive Net Worth computed in terms of Clause 11.3 and 11.4.”

3) Additionally, clause 11.6 will also be important to reproduce:

“11.6 Additional Conditions for bidding by Consortium: *IBs are permitted to form a consortium of eligible entities (“Consortium”) to participate in the Proposed Transaction.*

Formation of company: *In case of EOI by a Consortium, the Consortium shall form a company (special purpose vehicle) in India/under the laws of India, within the stipulated time as prescribed by GOI in the RFP. The equity shareholding of such company shall be the same as the interest of the members in the Consortium, as submitted as part of the EOI (subject to clause 12.1).*

(a)Lead Member: *The Consortium shall have one (1) lead member.*

(b)Minimum stake requirement in the Consortium/ company:

(i)

(ii)

(c) Net Worth/ACI requirement:

(i) Minimum Net Worth/ ACI of Each Member: *Net Worth/ACI of each participating member (on their own or through its Affiliate) should be equal to or more than 10% of the Net Worth/ACI requirement for the Consortium (i.e. 10% of INR 35,000 Mn). However, if the member of the Consortium is a Scheduled Airline Operator in India, the condition to meet minimum share of Net Worth requirement shall not apply to such member provided interest (in Consortium) and equity shareholding of such member in the company (special purpose vehicle promoted by the members of the Consortium for acquiring the Company) is restricted to maximum of 51%. In case of a foreign airline (i.e. airline which is not a Scheduled Airline Operator in India), the requirement to meet minimum share of the Net Worth/ACI requirement shall remain applicable*

(ii) Aggregate Net Worth/ ACI of Consortium: *The aggregate Net Worth (or ACI if applicable) of all the members of the Consortium should meet the Net Worth/ACI requirement as mentioned in clause 11.2 above. The negative Net Worth of a member, only if it is a Scheduled Airline Operator in India, would be considered as nil (assuming the Scheduled Airline Operator has not taken the benefit of financial strength of its Affiliate). However, the remaining members of the Consortium in this case will have to meet the minimum Financial Capability for Consortium as a whole and also their respective, Net Worth/ACI requirement in the Consortium.”*

4) From the above, it would be seen that the interested bidder (whether a sole bidder or consortium) should satisfy the criteria of having minimum net worth of INR 35,000 Mn (INR 3,500 Crore) (hereinafter amounts to be

referred in crores) computed in terms of Clause 11.3 and 11.4 or ACI (Available Capital for Investment) of 35,000 Mn (INR 3,500 Crore) computed in terms of Clause 11.3 and 11.4. In addition, as per clause 11.6(c) in case of a consortium, net worth/ACI of each participating member should be more than 10% of 3500 Crore i.e. each member of the consortium should have net worth/ACI more than 350 crore.

5) The first part of Clause 11.3 is what is relevant for our purpose, which provides the definition of the expression of “net worth” for adjudging the financial capability of the interested bidder.

6) As quoted above, Net Worth means the aggregate value of the paid-up equity share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet. Most relevant for our purpose is the proviso in Clause 11.3(a) which states for determination of the Net Worth, “any reserves created out of revaluation of assets, write-back of depreciation and amalgamation, intangible assets, redemption reserves, reserves made for any specific purpose shall not be included. Such methodology shall be applicable even to entities that are not incorporated in India (‘Net Worth’)”. (emphasis supplied)

7) The case of the Petitioner is that under the Scheme of Amalgamation sanctioned by this Court on 19.01.2012 in which it was, *inter alia*, provided that any surplus arising out of the amalgamation, i.e. the difference between the net assets to be transferred to the transferee company (i.e. the Petitioner) on the one hand, and the amount of shares to be allotted to the shareholders

of the transferor companies by the transferee company, on the other, shall be credited in the books of the transferee company as general reserves, and may be utilized for the purpose of issuance of bonus shares and payment of dividend by the transferee company.

8) The submission of Mr. Jayant K. Mehta, Senior counsel for the Petitioner is that the net worth of the Petitioner has been computed at Rs. 421.76 Crores (which is more than the required net worth of Rs. 350 Crores). The Petitioner had included the amount credited to the general reserve of the Petitioner company in terms of paragraph 6(f) of the amalgamation scheme as sanctioned by court on 19.01.2012.

9) At this stage itself, we may observe that Respondent No.1 and 2 engaged the services of a professional accounting firm, namely, Ernst & Young LLP which has been impleaded as Respondent No.3 in these proceedings. Respondent No.3 has filed its counter affidavit and written submissions, wherein Respondent No.3 has, *inter alia*, stated that the Petitioner does not satisfy the eligibility criteria of having net worth in accordance with the PIM.

10) The Respondents, after seeking clarification, from the Petitioner communicated vide email dated 15.03.2021 as under:

“

As communicated on March 6, 2021, the EOI submitted by your consortium was duly evaluated and found to not fulfil the eligibility requirements set out in the Preliminary Information Memorandum (as amended) (PIM) issued in respect of the strategic disinvestment of Air India Limited and liable for disqualification including on account of the Lead Member of

the Consortium not meeting the Net Worth requirement as prescribed in the PIM.

You may note that the PIM requires a Consortium to have a net worth of INR 35,000 Mn and each participating member of the Consortium is required to have a net worth of INR 3,500 Mn. After due consideration of the EOI and documents submitted by your Consortium, it has been determined that the net worth computed as per the terms of the PIM of the Lead Member of your Consortium, Kanti Commercials Private Limited, is -INR 1,245 Mn, which is lower than the required INR 3,500 Mn.”

11) Respondent No.3 in its counter affidavit also stated that it was found that the Petitioner’s net worth was INR 124.5 Crores, excluding the amalgamation reserve in accordance with Clause 11 of the PIM, as opposed to minimum requirement of Rs. 350 Crores.

12) The Respondent No.3 termed the Petitioners inclusion of amalgamation reserve of INR 297.26 Crores – for the purpose of computation of net worth, as misplaced and fallacious. The Respondent No.3, *inter alia*, stated in its response as follows:

“13. In regard to Respondent No. 3’s commercial views (which were also provided to Respondent No. 1 and 2) on this issue, it is submitted as follows:

a. The term general reserve is not specifically covered in the PIM definition of Net Worth. However, the PIM mentions that all reserves created out of profits and securities premium account are to be included.

b. The Scheme of Amalgamation approved by the Hon’ble High Court itself mentions that “any surplus arising out of the amalgamation, i.e. the difference between the net assets to be transferred to “the transferee company” on the one hand and the amount of shares to be allotted to the

shareholders of the transferor companies by the transferee company on the other, shall be credited in the books of the transferee company as a general reserve and may be utilized for the purpose of issuance of bonus shares and payment of dividend by the transferee company”.

c. Since the Scheme approved by the Hon’ble High Court states that these reserves are created out of the difference between net asset and amount of shares allotted (rather than explicitly through profits or securities premium account), these reserves may not be considered as a part of Net Worth.

d. Further, it has not been mentioned by the Petitioner that the Hon’ble High Court has stated that the general reserve should be considered as a part of net worth.

e. Hence, Petitioner ought to have been disqualified for not being able to meet the minimum Net Worth requirement.

14. Moreover, since Petitioner had raised the issues of treating the amalgamation reserve as “general reserve” in light of an order by the Hon’ble High Court and a legal opinion, the Respondent No. 3 also advised the Respondent No. 1 and 2 to seek legal advice on the same.

15. Accordingly, it is the Respondent No. 3’s humble submission that the Petitioner was not eligible in accordance with the eligibility criteria set out in Clause 11 of the PIM.” (emphasis supplied)

13) The submission of Mr. Mehta, learned Sr. counsel for the Petitioner is that upon sanction of the Amalgamation Scheme by this Court, in terms of paragraph 6(f), the excess amounts shall be credited to general reserve of the Petitioner company and, thereafter, it was entitled to be treated as a general reserve. Merely because the clause further provides that the general reserve

may be utilised for the purpose of issuance of bonus shares by the transferee company, does not take away from the fact that the excess amount was credited to the general reserve, and it was not necessary, that the scheme mandated that the Petitioner company would utilise the said excess amount towards payment of dividends or issuance of bonus shares only. All it means, is that utilization of the reserve towards payment of dividend and issuance of bonus shares, was an option which was available to the petitioner company.

14) He submits that the said option has not been exercised by the Petitioner company and, therefore, the excess amount was credited to the general reserve of the Petitioner company.

15) Mr. Mehta further submits that the reply of Respondent No.3 itself shows that they were not sure about their opinion, and that is why they state that they have written to Respondent No.1 and 2 to obtain legal opinion.

16) He has also drawn our attention to the stand taken by Respondent No.1 and 2 in their counter affidavit. He submits that a perusal of the said response would show that the respondents have incorrectly read and understood Clause 11.3 as excluding, for the purpose of determination of the net worth, any reserve created out of '....amalgamation', which is not the language used in Clause 11.3.

17) According to the submission of Mr. Mehta, it is only at the stage 2 of the PIM, that the eligible bidders are required to provide their Earnest Money Deposit and, it is at that stage, that the financial capability of the bidder is to be seen. Mr. Mehta has also submitted that the PIM also allows participation of scheduled Air Lines which have negative net worth. Thus,

his submission is that the financial qualification requirement laid down in the PIM for having financial capability as defined as it should be viewed in that light.

18) He submits that in relation to the Petitioner's failure to create a deposit in this Court for an amount of Rs. 350 Crores – in terms of the order passed by the Court on 19.04.2021, the Petitioner had informed the court on 19.04.2021 itself, when the order was dictated, that it would not be able to make the deposit of said amount by 4 p.m. as directed, since no company could be expected to have liquid reserves available at such short notice. He submits that the Petitioner was permitted by the Court, by an oral direction, to move an application seeking modification. Consequently, the Petitioner has moved CM No.15546/2021 for modification of the order dated 19.04.2021.

19) He further submits that the Petitioner is the lead member of the consortium which has made its application in response to the PIM and, admittedly, the other two members meet the requirement of net worth. At the same time, Mr. Mehta admits that each member of the consortium had to meet the said requirement, and according to him, the Petitioner has also met the said requirement.

20) Mr. Mehta submits that in case there is any ambiguity in Clause 11.3 of the PIM, the same has to be resolved in the favour of the Petitioner, since the Respondent is the author of the said document as per the *doctrine of contra proferentem*.

21) He also submits that since the process undertaken at this stage is only a preliminary process of screening, to allow the Petitioner to participate will

only increase the competition, and would in the larger interest of the public.

22) Mr. Mehta has placed reliance upon the following judgments in support of his submissions:

- *CIT v. Century Spinning and Manufacturing Co. Ltd.* [1954 SCR 203] to substantiate the meaning of reserve. In the judgment, following was the observation with regards to the meaning of reserve:

“6. The term “reserve” is not defined in the Act and we must resort to the ordinary natural meaning as understood in common parlance. The Dictionary meaning of the word “Reserve” is:

“1(a) To keep for future use or enjoyment; to store up for some time or occasion; to refrain from using or enjoying at once.

(b) To keep back or hold over to a later time or place or for further treatment.

6. To set apart for some purpose or with some end in view; to keep for some use.

11. To retain or preserve for certain purposes.” (Oxford Dictionary, Vol. VIII, p. 513).”

- *Metal Box Company of India Ltd. v. Workmen*, [(1969) 1 SCR 750] to highlight the distinction between ‘Provision’ and ‘Reserve’:

“15. The next question is whether the amount so provided is a provision or a reserve. The distinction between a provision and a reserve is in commercial accountancy fairly well known. Provisions made against anticipated losses and contingencies are charges against profits and, therefore, to be taken into account against gross receipts in the P & L account and the balance-sheet. On the other hand, reserves are appropriations of profits, the assets by which they

are represented being retained to form part of the capital employed in the business. Provisions are usually shown in the balance-sheet by way of deductions from the assets in respect of which they are made whereas general reserves and reserve funds are shown as part of the proprietor's interest: (see Spicer and Peglar's Book-keeping and Accounts, 15th Edn. p. 42). An amount set aside out of profits and other surpluses, not designed to meet a liability, contingency, commitment or diminution in value of assets known to exist at the date of the balance-sheet is a reserve but an amount set aside out of profits and other surpluses to provide for any known liability of which the amount cannot be determined with substantial accuracy is a provision.” (emphasis supplied)

- *Kranti Associates (P) Ltd. v. Masood Ahmed Khan*, [(2010) 9 SCC 496] and *Victoria Memorial Hall v. Masood Ahmed Khan*, [(2010) 3 SCC 732] are relied upon to submit that administrative decisions must record reasons in support of the decision. The following was observed in *Kranti Associates* (Supra) –

“47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of

judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or

“rubber-stamp reasons” is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37] .)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)] , wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, “adequate and intelligent reasons must be given for judicial decisions”.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of “due process”.

Then in **Victoria Memorial Hall** (Supra), the court held the following:

“41. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.....

42. Thus, it is evident that the recording of reasons is a principle of natural justice and every judicial order must be

supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as to why his application has been rejected.”

- *Om Prakash Sharma v. Ramesh Chand Prashar [(2016) 12 SCC 632]* is relied upon to argue that the “net worth” is not an essential condition. The Petitioner has referred to the following paragraphs:

“10. Now, the question that remains to be considered is whether requirement to furnish annual turnover and net worth for last three years was a mandatory condition for infraction of which the bid made by the appellant had to be rejected.

11. In Poddar Steel Corpn. v. Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] , this Court considered conditions which are essential conditions of eligibility and those which are ancillary or subsidiary with the main object to be achieved. It was observed in para 6 of the decision as under: (SCC p. 276)

“6. ... As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.”

12. In the present case, the site in question was to be sold on outright sale basis. The advertisement or the stipulations therein did not contemplate creation and or continuation of any relationship between the parties calling for continued existence of any particular level of financial parameters on part of the

bidder, except the ability to pay the price as per his bid. The condition was not an essential condition at all but was merely ancillary to achieve the main object that was to ensure that the bid amount was paid promptly. The advertisement contemplated payment of bid amount whereafter the sale deed would be executed and not a relationship which would have continued for considerable period warranting an assurance of continued ability on part of the bidder to fulfil his obligations under the arrangement. Nor was this condition aimed at ensuring a particular level of financial ability on part of the bidder, for example in cases where the benefit is designed to be given to a person coming from a particular financial segment, in which case the condition could well be termed essential. The idea was pure and clear sale simpliciter. As a matter of fact, the appellant did pay the entire bid amount within the prescribed period and the sale deed was also executed in his favour. In the circumstances, the relevant condition in the advertisement would not fall in the first category of cases as dealt with by this Court in Poddar Steel Corpn. [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] The authorities could therefore validly deviate from and not insist upon strict literal compliance. The discretion so exercised by the authorities could not have therefore been faulted. Thus, the assessment made by the High Court that the condition in question was an essential condition, for non-compliance with which, the bid furnished by the appellant was required to be rejected, in our view was not correct.”

23) Respondents No. 1 and 2 have filed their detailed counter affidavits. In the counter affidavits the respondent have stated “*that the amalgamation reserve in the books of the Petitioner was created as a balancing entry for the difference between the net assets to be transferred to the Petitioner and the amount of shares to be allotted by the Petitioner are not created of profits of the Petitioner*”. The respondent had also sought an expert opinion to arrive at an informed decision. The financial capability i.e. the “Net

Worth” requirement is a core eligibility requirement, and should be strictly applied since it pertains to the financial wherewithal of the bidders to take over the National carrier, Air India.

24) In addition, Respondents have further raised the following points:

- a) The Petitioner is seeking to negate and dilute the core eligibility requirement, which is the financial strength of the bidder to takeover the National Airline, Air India Limited.
- b) The Petitioner does not meet the “Net Worth” requirements prescribed in the PIM.
- c) Contrary to the submissions of the Petitioner, the order of the High Court dated January 19, 2012 and Accounting Standards do not support the Petitioner’s case. It is undisputed that the ‘amalgamation reserves’ recorded in the latest audited financial statements of the Petitioner were created on basis of a Scheme of Amalgamation. The Petitioner being the author of the Scheme, specifically provided that the surplus between the net assets to be transferred to the Petitioner, and the shares to be issued by the Petitioner under the Scheme of Amalgamation, be credited to the general reserves for the specific purpose of issuance of bonus shares and payment of dividend by the Petitioner. Thus, it is evident that the surplus resulting from the amalgamation could be used only for the specific purposes of issuance of bonus shares and payment of dividend. The said amount, in any event, would not be available to the Petitioner Company for being expended for carrying out any business activity. It is submitted that the

Petitioner being the author of the Scheme, did not include any term in the Scheme which allows for such surplus to be utilised for all purposes, or be considered for calculation of net worth of the Petitioner. Additionally, the sanction order merely approved the Scheme of Amalgamation authored by the Petitioner, and did not, in any manner, expand the scope for utilization of surplus arising from the said amalgamation.

- d) Amalgamation Reserve of the Petitioner is a notional reserve, in the nature of a book entry, since it is not a reserve created out of profit, and does not reflect the financial strength of the Petitioner.
- e) The decision to disqualify the Petitioner's Consortium from the Bid Process was taken after seeking appropriate clarifications; consideration of the material on record, and; after due application of mind in the light of the legal opinion sought.
- f) The interpretation of the "Net Worth" criteria and the other terms provided in the PIM are for the Respondents to undertake. Further it is a settled position of law 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 the interpretation adopted by the author of the tender, particularly, when there is nothing to show that the same is unreasonable, implausible or arbitrary.

25) We have heard the learned counsel for the parties and have gone through their documents. Clause (f) of the Scheme of the Amalgamation

reads as under:

“(f) Any surplus arising out of the amalgamation, i.e. the difference between the net assets to be transferred to ‘THE TRANSFEREE COMPANY’ on the one hand and the amount of shares to be allotted to the shareholders of ‘THE TRANSFEROR COMPANIES’ by ‘THE TRANSFEREE COMPANY’ on the other, shall be credited in the books of ‘THE TRANSFEREE COMPANY’ as general reserves and may be utilised for the purpose of issuance of bonus shares and payment of dividend by ‘THE TRANSFEREE COMPANY’.”

26) A bare perusal of Clause (f) of the Scheme of Amalgamation clearly shows that the so-called general reserve of the Petitioner is a surplus arising out of the difference between the value of the net assets to be transferred to the transferee company, i.e. the Petitioner Company, and the value of shares allotted to the shareholders of the Transfer Company. Firstly, we may observe that this General Reserve is only a notional book entry, since the value of the net assets transferred is something determined by the Transferor and Transferee Companies. This general reserve is not created out of the profits of the business conducted by the Transferee i.e. the Petitioner Company. Secondly, this general reserve could be utilised for the purposes of issuance of bonus shares and for payment of dividend by the transferee company. Thus, this so-called general reserve – which is only a book entry, cannot be utilised for the purpose of carrying out the business of the Petitioner Company.

27) On the other hand, Clause 11.3 of the PIM clearly stipulates that reserves made for any specific purpose will not be included in the “net worth”. It also excludes reserves created out of, inter alia, amalgamation.

28) Respondent No.3, which is a professional Firm of Chartered

Accountants, and is an expert in the field, has filed their short counter affidavit as well as written submission, and the categorical stand of Respondent No.3 in its capacity as an expert has already been noticed hereinabove.

29) Firstly, we are not inclined to rely upon external sources for determining the meaning of “General Reserve”. The Preliminary Information Memorandum is a complete document in itself. It clearly provides that reserves made for any specific purpose, or reserves created out of, inter alia, amalgamation, shall not be included within the meaning of reserve. For the purpose of computation of Net Worth, it is only the reserve created out of profits and security premium account, which are relevant. The PIM consciously does not use the expression “General Reserve”. The reason why reserve created out of, inter alia, amalgamation is excluded, is because it does not reflect an actual available reserve – like a reserve created by profits and security premium account, and it is a book entry as it is notional.

30) Additionally, in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd*¹, the Supreme Court has observed that, “*the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance.*” Furthermore, another important observation in the same judgment is 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

¹ (2016) 16 SCC 818.

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.”

31) The petitioner seeks to ignore the express words used in the PIM, and advance its own understanding of what it understands “General Reserve” to mean, which is wholly irrelevant and contrary to the express definition of Net Worth contained in the PIM.

32) The third contention of the Petitioners is that the Respondent must record reasons for their administrative decision. In our view, the Respondent vide email dated 15.03.2021 have provided the reasoning for the petitioner’s disqualification. The email stated that “*the PIM requires a Consortium to have a net worth of INR 35,000 Mn and each participating member of the Consortium is required to have a net worth of INR 3,500 Mn. After due consideration of the EOI and documents submitted by your Consortium, it has been determined that the net worth computed as per the terms of the PIM of the Lead Member of your Consortium, Kanti Commercial Private Limited, is -INR 1,245 Mn, which is lower than the required INR 3,500 Mn.*” The respondents may not have informed the petitioner about the minute details of the decision making process, but they have provided the reasoning for their disqualification.

33) Lastly, the Petitioner by relying on ***Om Prakash Sharma*** (Supra) has stated that net worth is not an essential condition. We cannot agree with this contention. We are not required to go into the reason or basis of a tender

condition, as the Tender Floating Authority knows best the purpose of the tender, as well as the objective which it seeks to achieve through floating of the tender [as also stated in Afcons (Supra)]. Even otherwise, the tender in the present case concerns strategic disinvestment of Respondent No. 4 Company by way of the transfer of management control and sale of 100% equity share capital of Respondent No. 4 Company held by the Government of India, including Respondent No. 4's shareholding interest of: (i) 100% in Air India Express Limited and (ii) 50% in Air India SATS Airport Services Private Limited. Hence, having the stipulated Net Worth is intended to establish the financial capability and viability of a prospective bidder. The intention of the Tender Floating Authority appears to be that the bidder must be of a sound financial condition, who has adequate Net Worth (350 crore) available with it, without any encumbrances of conditions attached.

34) As for the argument of the counsel of the Petitioner that existing Airlines are allowed to participate even with negative net worth, we cannot agree with the petitioner's contention, for the reasons, that the existing Airlines have the experience of operating an airline and they, therefore, fall in a different class altogether.

35) Merely because two members of the consortium meet the net worth requirement, the petitioner could not be allowed – on this basis, to participate in the PIM. Clause 11.6 of the PIM is clear and unambiguous. It clearly states that '**each participating member**' should meet the minimum net worth requirement. Hence, this ground has no merit.

36) There is no ambiguity in Clause 11.3, 11.4 and 11.6, and the counter affidavit of Respondent No. 3 makes clear the reasons for disqualification in

great detail, and we are in complete agreement with the reasons provided. There is nothing to show any unreasonableness, arbitrariness, or mala fide in the decision making process, or the decision itself. The reserve of the Petitioner largely is a notional reserve, created upon amalgamation, and is only a book entry.

37) Furthermore, vide email dated 30.12.2020, the technical expert had asked the Petitioners to provide additional documents/information. It is clear that the technical expert had undertaken a careful evaluation of the bid, which is also clear from the counter affidavit placed on record by the Respondent No. 3, Ernst and Young. It will also be pertinent to take note of observation of the Supreme Court in *Sam Built Well Private Limited v. Deepak Builders and Others*², wherein it observed that “Not having found mala fides or perversity in the technical expert reports, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical evaluation, best left to technical experts, would be outside its ken. As a result, we find that the learned Single Judge was correct in his reliance on the three expert committee reports. The Division Bench, in setting aside the aforesaid judgment, has clearly gone outside the bounds of judicial review. We, therefore, set aside the judgment of the Division Bench and restore that of the learned Single Judge.”

38) The decisions relied upon by the petitioner are of no avail in the light of the above discussion.

39) In this view of the matter, and for the reasons as stated above, we see no reason to interfere in the decision of petitioner’s disqualification vide

² (2018) 2 SCC 176.

emails dated 06.03.2021 and 15.03.2021. It is important to point out that the scope of judicial scrutiny is limited in tender matters, as has been the observation of the Supreme Court in *Tata Cellular v. Union of India*³:

“77. ...

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.”

40) We, therefore, do not find any infirmity in the decision of the Respondents. We, accordingly, dismiss the present writ petition.

VIPIN SANGHI, J

JASMEET SINGH, J

AUGUST 10, 2021/ ‘ms’

³ (1994) 6 SCC 651.