

\$~15

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

Date of Decision: 17.08.2021

+ W.P.(C) 5603/2021 & CM APPLs. 17459/2021, 23008/2021
MAAN PHARMACEUTICALS LTD. Petitioner
Through: Mr. Vibhor Garg, Mr. Sidhant Bhatia,
Mr. Keshav Tiwari, Advs.
versus
EMPLOYEES STATE INSURANCE CORPORATION
..... Respondent
Through: Mr. Shlok Chandra, SC for ESIC, Mr.
Shrey Chakraborty, Adv.
Mr. Abhinav Sharma, Adv. for RBI

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT OF THE COURT

1. The central issue that arises for consideration in W.P.(C) 5603/2021 is whether the Respondents were justified in declaring the Petitioner's bid to be technically non-responsive on the ground that the Petitioner had submitted a bank guarantee obtained from the Mehsana Urban Cooperative Bank Ltd. (hereinafter referred as MUCBL) towards Earnest Money Deposit "EMD" and that the same Bank was not a "*Commercial Bank*" as per clause 2(I) of the terms and conditions of e-Tender Enquiry.
2. The Respondent published the E-tender enquiry No. U-25/12/142C-146C/2019-Med.V on 01.01.2021 for supply of drugs for use of ESI institutions all over India. The last date for submission of online bids was 15.02.2021.

3. On 19.01.2021, a pre-bid meeting was held between the prospective bidders and the Respondents. On 11.02.2021, the Respondent issued a corrigendum clarifying the queries raised by the participating firms. The last date for submission of online bids was extended to 06.03.2021.

4. The Petitioner submitted 4 bids in response to the said tender for tender bearing Nos. 142-C, 143-C, 145-C and 146-C on 28.02.2021. The Petitioner also manually/ physically submitted the Labels, Integrity Pact and EMD in the form of bank guarantee issued by their banker, namely, the Mehsana Urban Co-operative Bank Ltd.

5. On 30.03.2021, the Petitioner was disqualified, as aforesaid, on the ground that the 4 EMDs submitted by the petitioner in the form of Bank Guarantees from Multistate Scheduled Cooperative Commercial Bank i.e. MUCBL were stated to be not from a Commercial Bank and, therefore, in violation of Tender Clause No. 2(I).

6. The Petitioner submitted a representation on 31.03.2021 stating that the said MUCBL was a commercial bank and was also registered with the RBI. The said Bank was also entitled to issue bank guarantees. However, the Respondents did not take any decision to entertain the Petitioner's bid. Consequently, the present writ petition was filed wherein the reliefs sought by the Petitioner, were to seek the quashing and setting aside of the memorandum dated 30.03.2021 and letter dated 12.05.2021, in so far as they disqualified the 4 bids of the Petitioner aforesaid. The Petitioner also seeks a direction to the Respondent to accept the EMD in the form of Bank guarantees submitted by the Petitioner's bids as aforesaid.

7. When this petition was listed on 02.06.2021, we issued notice to the Respondents. Notice was accepted by Mr. Shlok Chandra on behalf of the Respondent. We directed that till the next, the tender in question should not be finalised.

8. The Respondent moved an application being CM No.18584/2021 to seek modification of our order dated 02.06.2021 by expressing urgency in the matter. However, we were not inclined to vacate the interim order passed by us. At that stage, it was stated by the learned counsel for the Respondent that they are agreeable to open the Petitioner's financial bid along with those of the other qualified bidders and further that, in case, the Petitioner is found to be the lowest bidder, the contract would also be awarded to the Petitioner, without prejudice to the rights and contentions of the parties. Accordingly, on 04.06.2021, we modified the order dated 02.06.2021 to the extent that the Respondent was permitted to proceed with opening of financial bids of all the eligible bidders and that of the Petitioner as well, and to award the contract, subject to further orders in the writ petition.

9. The matter was heard at some length on 02.08.2021. To gain clarity on the issue whether Mehsana Urban Cooperative Bank Ltd. is a "*Commercial Bank*", or not, we directed that notice be issued to the RBI, to have their opinion before us on the said issue. Accordingly, the RBI appeared and they have also placed on record, an affidavit stating their position.

10. On 09.08.2021, even before the start of arguments (the RBI had put in their response), learned counsel for the Petitioner Without Prejudice stated

that the Petitioner is willing to replace the bank guarantees in question issued by MUCBL with Bank Guarantees of same amount issued by a commercial bank acceptable to the Respondent. Mr. Chandra who appears for the Respondents, sought time to take instructions, in this regard. The matter was adjourned to 10.08.2021. On 10.08.2021, Mr. Chandra reported on instructions that the Respondent is not willing to accept submission of a substituted bank guarantee.

11. The matter was adjourned for 17.08.2021 and the parties have been heard. The RBI has filed an affidavit and Mr. Chandra has also filed certain documents.

12. We have heard Mr. Vibhor Garg, learned counsel for petitioner, Mr. Chandra, learned counsel for Respondent No.1 and Mr. Sharma, learned counsel for RBI. The core issue for our consideration is that whether MUCBL is a "Commercial Bank" and satisfies the rigour of Clause 2(I) of the terms and conditions of E-tender enquiry.

13. Clause 2(I) of the tender in question reads as under:

"2. EARNEST MONEY DEPOSIT

- I. The bidder must submit Earnest Money Deposit (EMD) as calculated along with this tender in the form of Account payee Demand Draft/Banker's Cheque/Bank Guarantee/FDR from *any Commercial Bank* in favour of ESIC FUND ACCOUNT NO I, NEW DELHI."**

14. The learned counsel for the Petitioner has urged and argued before us that the Respondents have carved out a micro distinction between an Urban Cooperative Bank and a Commercial Bank with regard to issuance of bank guarantees. RBI itself has authorised MUCBL to issue bank guarantees. MUCBL is a scheduled bank as per the Reserve Bank of India (RBI) Act,

1934. The Petitioner had submitted a certificate from MUCBL dated 02/04/2021 stating that the said bank is a Multistate Scheduled Cooperative Commercial Bank, and is also registered under the Reserve Bank of India with license No. DB.OD/UBD-GJ-357P dated 28.09.1983.

15. MUCBL is doing all activities of a commercial bank, like accepting deposit, providing loans, transfer of funds, issuance of bank guarantees etc. The Petitioner has pointed out that earlier, when the Petitioner had participated in another Tender floated by the Respondent ESIC, being Tender No. U-25/12/148/2018-Med.V dated 22.05.2019, the Petitioner had submitted the Bank Guarantee from the same MUCBL, which was accepted by the Respondent without objection, and the Petitioner was not disqualified on that ground.

16. The Respondent No.1 has filed a counter affidavit and stated that in respect of MUCBL, the Central Registrar of Cooperative Societies has appointed an Arbitrator to resolve issue of misappropriation of funds by the Chairman and some Directors of MUCBL, and it has been fined Rs. 5 Crores by RBI on 04.11.2019 for contravention of Directions issued by RBI. MUCBL was fined Rs. 1 Crore for violating directives to Urban Cooperative Banks relating to grant of advances to Directors and their relatives. On merits, the learned counsel for the Respondent submits that the MUC is a bank that is registered under the Co-operative Societies Act, 1961, and therefore, cannot be regarded as a Commercial Bank. A Commercial Bank is regulated by the provision of the RBI Act, 1934 and the Banking Regulations Act, 1949. Even though the RBI has not defined 'Commercial Bank', there are certain concepts on the RBI website which explain what are

Commercial Banks. As per RBI website, Commercial Banks refer to both, scheduled and non-scheduled Commercial Banks and are regulated under the Banking Regulations Act, 1949. Scheduled Commercial Banks are grouped under the following categories:

- “ 1. *State Bank of India and its Associates;*
2. *Nationalized Banks;*
3. *Foreign Banks;*
4. *Regional Rural Banks;*
5. *Other Scheduled Commercial Banks*
(b) *Non-Scheduled Commercial Banks* “

17. Hence, MUCBL is not a Scheduled Commercial Bank. The RBI has also filed a detailed counter affidavit pursuant to our order dated 10.08.2021. At the outset, the RBI has stated in its affidavit that “*‘commercial bank’ is not defined either in the Reserve Bank of India Act, 1934 or the Banking Regulations Act, 1949 or the Companies Act, 2013.*” However, the said statement has been qualified by the RBI to say that the RBI has been using the term “commercial banks” to refer to the following types of banks:

- “4. *The RBI has been using the term 'commercial banks' to refer to the following types of banks, namely: -*
(i) *banking companies - that are constituted as companies and registered under the Companies Act;*
(ii) *the public sector banks (meaning SBI constituted under the SBI Act, 1955 and the banks that were nationalised by the Banking Companies (Acquisition and Transfer of Undertakings) Acts of 1970 and 1980; and*
(iii) *Regional Rural Banks constituted under the Regional Rural Banks Act, 1976.*”

18. The RBI also states that in its Annual Report, and various guidelines issued by it, the expression “Commercial Banks” has been used to exclude ‘*cooperative banks*’, which are cooperative societies that are established in accordance with co-operative principles, and registered under respective Cooperative Societies Act and carry on banking business. The RBI in

Master Direction – Reserve Bank of India [Cash Reserve Ratio (CRR) and Statutory Liquidity Ratio (SLR)] Directions – 2021 dated 20.07.2021 defined the terms “scheduled commercial bank” to mean:

“xxvi) ‘Scheduled Commercial Bank’ shall mean a banking company included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934) and includes the State Bank of India, corresponding new bank and Regional Rural Bank.”

19. The list of ‘Scheduled Commercial Banks’ is available online on the website of RBI and does not include co-operative banks much less, MUCBL. It has further been submitted by the RBI that the practice to exclude cooperative banks from Commercial Banks has been evolved over time by usage and practice, and there is no statutory definition as the basis of this distinction.

20. We have heard the learned counsels for the parties. From the documents on record, it is abundantly clear that there is no definition of “Commercial Bank” in the Reserve Bank of India Act, 1934; Banking Regulations Act, 1949; or Companies Act, 2013. As per RBI website, Commercial Banks include both scheduled and non-scheduled commercial banks. Scheduled Commercial Banks are grouped under the following category:

- “ 1. State Bank of India and its Associates;*
- 2. Nationalized Banks;*
- 3. Foreign Banks;*
- 4. Regional Rural Banks;*
- 5. Other Scheduled Commercial Banks*
- (b) Non-Scheduled Commercial Banks “*

21. As per the documents filed before us, MUCBL comes within the list of banks registered under the Multi State Cooperative Societies Act, 2002.

22. In the absence of there being a clear definition of the term “Commercial Bank” in any of the statutes, we have to rely on a common sense approach. A “Commercial Bank” would have to be understood as a bank which works on commercial principles and undertakes commercial activities, or renders banker’s services to its customers on commercial principles i.e. for a charge. The MUCBL on 02.04.2021 has issued a certificate stating that the bank is a multi-state scheduled cooperative commercial bank with a business of Rs. 11229.24 Cr. doing all activities of a commercial bank, like accepting deposits, providing loans, transfer of funds, issuing letter of bank guarantee etc. The Bank is registered with RBI vide license No. DB.OD/UBD-GJ357P dated 28.09.1983 and has been authorised to issue bank guarantees by RBI itself. The Finance Department of the Government of Gujarat vide resolution FD GR No. EMD/10/2020/42/DMO dated 19.10.2020, GR Corrigendum: EMD/10/2020/42/DMO dated 11.01.2021 and GR. No.: EMD/10/2021/7729/DMO dated 12.04.2021 recognizes and permits acceptance of Bank Guarantees issued by MUCBL by the PSU for the purposes of EMD. The said resolution has further been extended up to 31.03.2021. Hence, MUCBL is doing all activities of a commercial bank. The distinction which the Respondent has drawn as well as borne out from the affidavit of RBI is only with regard to “***Scheduled Commercial Bank***”. It is an admitted fact that MUCBL is not a Scheduled Commercial Bank, as defined in the circulars of the RBI. The website of the RBI as well as the act and regulation only define a “***Scheduled Commercial Bank***”. The phrase “**Commercial Bank**” has only been evolved by usage and practice and is only understood in banking circles. The Petitioner cannot be expected to

know the subtle difference with which the Petitioner is not concerned. Merely because the structure of MUCBL is created in terms of the Multi State Cooperative Societies Act, and it is recognized as a Multi State Cooperative Society, it does not take away from the fact that it is a “Commercial Bank” nevertheless. Its activities and banking operations are regulated by the norms laid down by the RBI nonetheless. The tender document itself does not use the word “*Scheduled Commercial Bank*”, but only the phrase “any commercial bank”. If the Respondent No.1 was so particular, nothing prevented the Respondent from using the phrase “*Scheduled Commercial Bank*” in place of “*Commercial Bank*”.

23. Even if we were to accept that the Respondent ESIC intended from the beginning that only Bank Guarantees furnished by Scheduled Commercial Banks should be accepted, it was the Respondent’s fault of not laying down the specific requirement in the tender. This lapse, should not be faulted against the Petitioner. The Petitioner cannot be prejudiced for relying on common parlance definition of ‘*commercial bank*’, thinking for it to mean no more than a bank undertaking routine commercial transactions. We, ourselves, had to resolve to the aid of RBI to get an understanding of what the ‘Scheduled Commercial Bank’ means, as opposed to ‘Commercial Bank’, as stipulated by the Respondents. RBI clearly stated in its affidavit that “Commercial Banks” have not been defined, and took us to various terms such as ‘Scheduled Commercial Bank’, ‘Non-scheduled Commercial Bank’ and ‘Urban Co-operative Bank’. Such distinctive terms/classifications within the strata of Banks may be common in financial institutions, such as, RBI, but to take this understanding of distinctions - as a

given for Government Undertakings and its bidders, would be a stretch.

24. As stated above, we were also made aware of this distinction by the RBI in court, therefore, for reference, we have also referred to Oxford Dictionary and Black's Law Dictionary. As per the Oxford's Dictionary, Commercial Bank means "*a bank that offers services to the general public and to companies*". The Black's Law Dictionary defines commercial bank as "*(18c) A bank authorized to receive both demand and time deposits, to make loans, to engage in trust services, to issue letters of credit, to rent time-deposit boxes, and to provide similar services. • Once primarily used in antithesis to investment bank, the term commercial bank now commonly denotes a bank that serves mostly businesses.*" [BANK, Black's Law Dictionary (11th ed. 2019)]. The following definitions make the plain meaning of the term 'Commercial Bank' clear. It means a bank conducting everyday transactions that are commercial in nature.

25. It is clear that the tender condition explicitly specified as a requirement, a bank guarantee from any 'commercial bank'. To read into this interpretation, a bank guarantee from a 'Scheduled Commercial Bank' of the RBI would be an implication. This implication by the respondents is not permissible. We are helped in our opinion by the Hon'ble Supreme Court in *Nabha Power Ltd. v. Punjab SPCL*¹, wherein the Court was concerned with interpretation of a commercial contract *inter se* the parties and was specifically concerned with existence of implied term or implied terms in a contract. It was observed:

¹ (2018) 11 SCC 508.

“49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

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.”(emphasis supplied)

26. The implication of reading into the tender condition, “Scheduled Commercial Bank” does not meet the Penta test as specified above. Thus;

- (i) It is not reasonable or equitable to read into a tender condition, a specification which was not there, post the bids have been submitted and opened, without issuing any clarity in the matter during the pre-bid meetings.
- (ii) To provide a Bank Guarantee from a ‘Scheduled Commercial Bank’ is not necessary to give business efficacy to the contract. As stated above, The Finance Department of the Government of Gujarat vide resolution FD GR No. EMD/10/2020/42/DMO dated 19.10.2020, GR Corrigendum: EMD/10/2020/42/DMO dated 11.01.2021 and GR. No.: EMD/10/2021/7729/DMO dated 12.04.2021 recognizes and permits acceptance of Bank Guarantees issued by MUCBL by the PSU for the purposes of

EMD. The said resolution has further been extended up to 31.03.2021. Therefore, acceptance of a bank guarantee by MUC does not disparage the tender in any manner.

- (iii) It does not meet the Officious Bystander Test as the RBI had to be called upon to give the court some clarity in this matter with regards to 'Commercial Bank'.
- (iv) It is not capable of clear expression, as nowhere in the bank guarantee condition, the word 'Scheduled' has been mentioned.
- (v) Lastly, the implication does contradict the plain meaning of the tender condition by reading into it, a specification that was not there. The respondents are straying from what is clearly stipulated in the tender document and are creating unnecessary complications. If they required a bank guarantee from a scheduled commercial bank then the same should have been expressly and explicitly mentioned in the tender document.

27. Therefore, we are not agreeable to reading into the tender condition, an implied term. As stated by the Supreme Court, it is something to be done with caution and we see no necessity for the same.

28. We do not think that there is any ambiguity in the tender condition, which is to be left to the interpretation of the tender floating authority. Nevertheless, even if there was any ambiguity, the principles of contra proferentum are clear and have been explained in the following Supreme Court cases:

- In *Industrial Promotion & Investment Corpn. of Orissa Ltd. v. New India Assurance Co. Ltd.*², it was observed-

“10. We proceed to deal with the submission made by the counsel for the appellant regarding the rule of contra proferentem. The Common Law rule of construction “verba chartarum fortius accipiuntur contra proferentem” means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. MacGillivray on Insurance Law [Legh-Jones, Longmore et al (Eds.), MacGillivray on Insurance Law (9th Edn., Sweet and Maxwell, London 1997) at p. 280.] deals with the rule of contra proferentem as follows:

“The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. ‘One must not use the rule to create the ambiguity — one must find the ambiguity first.’ The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances.” (footnotes omitted)

11. Colinvaux's Law of Insurance [Robert and Merkin (Eds.), Colinvaux's Law of Insurance (6th Edn., 1990) at p. 42.] propounds the contra proferentem rule as under:

“Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentes, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have

² (2016) 15 SCC 315.

understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt. But a clause is only to be contra proferentes in cases of real ambiguity. One must not use the rule to create an ambiguity. One must find the ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly.”

(footnotes omitted)”

- Then in *United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd.*³, it was observed-

“37. In Halsbury's Laws of England (5th Edn., Vol. 60, Para 105) principle of contra proferentem rule is stated thus:

“Contra proferentem rule.—Where there is ambiguity in the policy the court will apply the contra proferentem rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured. Similarly, as regards language which emanates from the insured, such as the language used in answer to questions in the proposal or in a slip, a construction favourable to the insurers will prevail if the insured has created any ambiguity. This rule, however, only becomes operative where the words are truly ambiguous; it is a rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application.”

39. It is a settled rule of interpretation that when the words of a statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. In other words, when a language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. Equally well-settled rule of interpretation is that

³ (2016) 3 SCC 49.

whenever the NOTE is appended to the main section, it is explanatory in nature to the main section and explains the true meaning of the main section and has to be read in the context of main section (See G.P. Singh, Principles of Statutory Interpretation, 13th Edn., pp. 50 and 172). This analogy, in our considered opinion, equally applies while interpreting the words used in any contract.”

29. The above cited judgments makes two points clear – firstly, ambiguity cannot be read into a condition/clause when there exists none, to make the doctrine of contra proferentem applicable and secondly, even if there exists any ambiguity, then it shall be construed against the drafter of the said contract or tender in the case before us.

30. Therefore, it leads to only one conclusion that the respondents cannot read ambiguity into the tender condition. In absence of any ambiguity, the plain and express meaning of the condition has to be complied with.

31. The averments with regard to the RBI initiating action against MUCBL or Central Registrar of Co-operative Societies ordering arbitration to resolve issues is neither relevant nor germane to the issue in controversy, and that is not the reason why the bids of the Petitioner have been declared as technically non-responsive. Levy of penalty by the RBI has not been specified in the tender conditions, as disqualifying a Bank from furnishing its Guarantee. We may observe that there are a number of instances, when even Scheduled Banks have been subjected to penalties. That is not relevant. What is relevant is the MUCBL is a running bank, where license has not been suspended or cancelled by the RBI. There is no curb put by the RBI on MUCBL to restrain it from undertaking commercial banking activities,

including issuance of Bank Guarantees.

32. In *Mohinder Singh Gill v. Chief Election Commr.*⁴, it has been stated that **“when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.”** The reason for rejection is only that the MUCBL does not fall within the definition of “Commercial Bank” which, in view of our discussion, is not correct.

33. It has been held in the Supreme Court judgment of *Tata Cellular v. Union of India*⁵ that -

“71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.”

34. There is another aspect which weighs in our mind while allowing this petition. The Respondent, in another tender, bearing tender no. Tender No. U-25/148/2018-Med.V dated 22.05.2019, entertained and accepted the Petitioner’s bid, even though the same was accompanied by a Bank Guarantee issued by the MUCBL. This, firstly, shows that the ground for rejection of the Petitioner’s Technical Bid for the tender in question was an after-thought, and it was not in the Petitioner’s understanding – to begin

⁴ (1978) 1 SCC 405.

with that the Bank Guarantee of only a “Scheduled Commercial Bank” would be acceptable. It also shows that a Bank Guarantee issued by the MUCBL was considered by the Respondent as one issued by a “Commercial Bank”. The Respondent, by its said conduct, has also conveyed an impression, and made a representation that a Bank Guarantee furnished by the MUCBL is acceptable to it. If the Respondent had raised an objection earlier, the Petitioner would have had the opportunity to furnish the Bank Guarantee in response to the tender in question from a Scheduled Commercial Bank, as has been offered by it, even during the course of the hearing.

35. Therefore, we cannot allow the respondents to read into the condition, any ambiguity, and the Respondent is bound to interpret the condition 2(I) in its plain-express meaning.

36. Hence, we allow the above writ petitions and quash the Memorandum dated 30.03.2021 and Letter dated 12.05.2021. The Respondents are directed to consider the Bid of the Petitioner on its merits and deal with the same in accordance with law.

VIPIN SANGHI, J

JASMEET SINGH, J

AUGUST 17, 2021/ ‘ms’

⁵ (1994) 6 SCC 651.