

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 1184 of 2022

With

CAN 1 of 2022

CAN 2 of 2022

Reserved on: 25.08.2022

Pronounced on: 09.09.2022

Airport Authority of India

...Appellant

-Vs-

Masti Health & Beauty Private Limited and Others

...Respondents

Present:-

Mr. Jishnu Chowdhury,
Mr. Pratik Shanu,
Mr. Vishal Sinha, Advocates
... for the appellant

Mr. Sourav Ghosh,
Mr. Anirban Ray,
Mr. Snehashis Sen,
Mr. Debraj Sahu,
Mr. Abhishek Banerjee, Advocates
... for the respondents

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. This intra-court appeal is at the instance of the Airport Authority of India (respondent in the writ petition) challenging the order of the learned Single Judge dated 21.07.2022 passed in WPA 16011 of 2022.

2. So far as CAN 2 of 2022, an application under Order 41 Rule 27 of the CPC filed by the appellant is concerned, a perusal

thereof reveals that the appellant has placed on record the documents which were already part of the record in the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 between the parties in Misc. Case No. 2 of 2022. Before the learned Single Judge no affidavits were exchanged, therefore, appellant did not have appropriate opportunity to place these documents on record. Authenticity of these documents has not been disputed. We also find that these documents are relevant for the purpose of deciding the controversy involved in this appeal. Hence, CAN 2 of 2022 is allowed.

3. Learned Counsel for the parties have already advanced argument on merit in the appeal referring to the documents placed on record with CAN 2 of 2022 and the appeal has been heard finally with consent.

4. The respondent No. 1 herein (writ petitioner) had approached the writ Court by filing the petition with the plea that license for operating “wellness centre” inside domestic security hold area, terminal 2 of Netaji Subhas Chandra Bose International Airport, Kolkata dated 28th of May, 2019 was granted to the respondent No.1 thereafter the appellant had served the letter dated 05.01.2021 alleging that the High Court at Madras had attached the properties of the O2 Spa Salon Pvt. Ltd. at the airport and alleging that the respondent No.1 had violated the terms and conditions of the license agreement. The license was terminated vide communication dated 18.03.2021. Meanwhile tender notice dated 03.02.2021 was issued by the appellant for the same purpose of issuing license for operating wellness centre at the airport. The respondent No.1 had moved under Section 9 of the

Arbitration and Conciliation Act and thereafter had preferred the appeal under Section 37 of the Act being FMAT 6 of 2022 and the Division Bench by order dated 13th of January, 2022 had protected the possession of the respondent No. 1 and since by the time tender process was over, the respondent No. 1 was directed to be given an opportunity to match the highest bid. The tender was subsequently cancelled and demand notice was issued to the respondent No. 1. The appellant had subsequently floated fresh notice inviting e-tender (NIET) for wellness centre at the airport in Kolkata. Being aggrieved with some of the terms and conditions of the same, the respondent No.1 had filed WPA 16011 of 2022 with the prayer to cancel the NIET and also declare the clause 3(h) of NIET requiring submission of No Dues Certificate as null and void.

5. Learned Single Judge by the impugned order has set aside notice inviting tender and all subsequent steps taken thereto by the appellant. Learned Single Judge has held that the requirement of a No Dues Certificate included as an essential condition of eligibility in the technical bid resulted in effectively putting the respondent No. 1 out of the race and the same have the effect of coercing the respondent No. 1 to the payment of disputed amount. Learned Single Judge has further held that the tender condition was tailor-made to oust the respondent No. 1 from successfully participating in the tender and accordingly has set aside the NIET.

6. Submission of the learned Counsel for the appellant is that the tender condition of requiring No Dues Certificate was neither arbitrary nor tailor-made, therefore, it could not have been set aside. He has further submitted that similar condition exists in all the tenders

floated by the appellant all over India and quashing of the NIT on this ground may affect other contracts also. He has further submitted that the respondent No. 1 is a defaulter and amount is due in respect of the earlier contract and that the respondent No. 1 had participated in the tender process, therefore, he was estopped from questioning the tender condition. He has further submitted that application under Section 9 of the Arbitration Act filed by the respondent No. 1 has been dismissed and no steps have been taken by him to initiate arbitration proceedings. He also submits that earlier tender was cancelled because no bidder had qualified.

7. Learned Counsel for the respondent No. 1 (writ petitioner) has opposed the appeal by submitting that respondent No. 1 fulfils the essential eligibility conditions and the appellant has raised the demand on 09.03.2022 solely with the view to debar the respondent. He further submits that matter pending before the Madras High Court is in respect of trademark dispute. He further submits that the respondent No. 1 has wrongly been denied the opportunity by demanding No Dues Certificate in terms of clause 3(h).

8. We have heard the learned Counsel for the parties and perused the record.

9. The NIET for license to operate wellness centre/spa/massage chair inside Domestic Security Hold Area at NSCB Airport Calcutta was issued by the appellant in June, 2022. The said NIET contained clause 3(h) to the following effect:

“h) **No Dues Certificate:**

i. **Self-Declaration of Dues:**

The party should submit the details of contracts held **(current and past)** at all AAI controlled airports and offices and the details of **disputed and undisputed dues** there on along with the details of Security Deposit and mode of **Security Deposit** and mode of Security Deposit (**Refer Annexure: G**).

ii. No Dues Certification from AAI:

The party should also enclose the no dues certificate issued by AAI **up to 31.03.2021** in respect of all airports under its control. **Only signed certificate will be valid.** Photocopy of the signed certificate to be attested by the party at the time of tender submission. Format as per **Annexure: I**

10. In terms of annexure “G” to the NIET, the bidder was required to submit the declaration disclosing the dues (disputed and undisputed) and also declare that he had never been ordered by a Court of Law to pay the outstanding due to AAI at any of the airports.

11. Considering the clause 3(h) independently, this Court does not find any arbitrariness in that clause as the appellant was entitled to restrict those bidders against whom dues were pending. Similar clause relating to requirement of no due certificate had come up for consideration before the Division Bench of the Delhi High Court in the matter of **Renaissance Distilleries and Breweries Ltd. vs. Government of NCT of Delhi & Ors.** reported in **2007 SCC OnLine Del 1134** wherein the Division Bench had rejected the challenge by holding that:

“10. Before we examine the petitioner's submission that the condition requiring submission of a VAT Certificate

was not essential, we may note that the petitioner has not, and could not have challenged the prescription of the aforesaid Clause 2(x) read with Clause 6 of the NIT, whereunder the bidders were required to submit the said VAT Certificate, and it was stated that offers without, inter alia, the documents will not be entertained and be summarily rejected. This is so in view of the decision of the Hon'ble Supreme Court in *Tata Cellular v. UOI*, (1994) 6 SCC 651 : AIR 1996 SC 11. While laying down the principles relating to the scope of judicial review of administrative decisions and exercise of contractual powers by Government bodies, one of the principles deduced by the Court was that 'The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.' In the present case, the petitioner participated in the tender process, fully conscious of the conditions of the NIT, which expressly in unequivocal terms required the submission of the VAT certificate by the bidders and stated that bids not accompanied with the requisite documents would not be entertained and would be summarily rejected and is now seeking to challenge the rejection of its bid by advancing its own interpretation of the tender conditions."

12. Delhi High Court also considered the issue if such a clause is essential or non-essential and held that:

"26. From the above discussion, it follows that the condition prescribed in the NIT in question under Clause 2(x), is in fact an eligibility condition and since the petitioner did not fulfil the same, he had no right to be considered in the tender process in question. When the bid of the petitioner was opened, the shortcoming in its bid and its ineligibility was discovered. If the respondent authorities are directed to entertain the petitioner's bid, it would lead to denial of opportunity to others similarly circumstanced,

who might have been interested in submitting their bids for the tender in question, and who did not do so on account of, *inter alia*, condition No. 2(x) in the NIT. This is another reason why we find no merit in this petition [See *G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488; *R.D. Shetty v. Airport Authority of India*, (1979) 3 SCC 489 : AIR 1979 SC 1628].”

13. Similar issue also came up before the Division Bench of the Madras High Court in the matter of Brandmidas Hospitality & Aviation Services (P) Ltd. vs. Airports Authority of India and Ors. in W.A. No. 97 of 2022 wherein the Division Bench considering the similar condition prescribed by the appellant Airport Authority of India in a tender for grant of license for smoking lounges and sale kiosk at Chennai Airport has held that:

“24. We are unable to accept the argument aforesaid for the following reasons:

(i) When the General Information and Guidelines pertaining to tender was clear in terms to direct the tenderer to submit no due certificate of all the Airports, there was no reason for the appellant not to comply aforesaid condition. The eligibility criteria had not required the bidder to submit no due certificate, rather required the bidder to submit the certificate of experience of operating Smoking Lounges in three Airports or Five Star Hotels or Mall, etc. No due certificate was required to be furnished under General Information and Guidelines to find out whether the bidder has committed any default so as to determine the status of the bidder. The writ appellant had submitted no due certificate of three Airports, leaving two where there were outstanding dues on the date of submission of bid. Though subsequently no due

certificates were submitted along with the writ petition, it cannot improve the position of the writ appellant, because, the assessment of the bidder has to be made by the respondents at the time of opening of the technical bid;

(ii) The non submission of no due certificate of Bhopal and Goa Airports speaks against the writ appellant. At the time of submission of bid, there were outstanding dues against the appellant. Therefore, the appellant could not furnish no due certificates of the Airports at Bhopal and Goa. The power of the Court is otherwise very limited as it cannot sit as an appellate authority over the decision of technical experts, especially when the non submission of relevant documents is not a minor discrepancy. The expert, while evaluating the technical bid, would analyse the technical qualification and competence or eligibility of the bidder in all respects, which includes their previous similar projects and performance therein with status. The writ appellant remained defaulter in payment of dues to other Airports while operating Smoking Lounges and it was to be analysed by the respondents while evaluating the technical bid. Moreover, the tender documents were required to be submitted with Annexure G and I which also the writ appellant failed to do so. Thus, the rejection of the tender for that reason cannot be said to be illegal; and

(iii) Before rejection of the bid, there is no provision for an opportunity of hearing and otherwise, it has been given by the Court.”

14. Single Judge of the Madhya Pradesh High Court also in the matter of **Welcome Distillery Pvt. Ltd., Bilaspur vs. State of M.P. and Another** reported in **(2006) 2 MP LJ 273** considering the challenge to the condition No. 5(ii) requiring submission of no dues

and credibility certificate issued by the Excise Commissioner has held that such a condition is not arbitrary or irrational warranting any interference.

15. In view of the above and considering the nature of the condition, we find that the condition 3(h) is not arbitrary.

16. Learned Single Judge in the present case has considered the combined effect of admitted facts and the tender conditions and has arrived at a presumption that the tender was tailor-made to oust the petitioner.

17. Facts in the present case reveal that earlier license agreement dated 28th of May, 2019 for operating wellness centre inside Domestic Security Hold Area at new integrated termination building, terminal 2 Netaji Subhas Chandra Bose International Airport Kolkata was executed by the appellant in favour of the respondent No.

1. In terms of clause 6 thereof, the respondent No. 1 was liable to pay the license fee and in terms of clause 13 of the license there was a provision for payment of penalty. The license issued to the respondent No. 1 was terminated by the appellant vide communication dated 18.03.2021. The appellant had sent the demand notice dated 09.03.2022 to the respondent No. 1 raising the demand of about 4 crores. An application under Section 9 of the Arbitration and Conciliation Act was filed by the respondent No. 1 and the matter had travelled in appeal in FMAT 6 of 2022 at the instance of the respondent No. 1 before the Division Bench of this Court. Meanwhile, again tender was issued, therefore, Division Bench by the order dated 13.01.2022 gave right to respondent No. 1 to match the highest bid. The documents placed on record reveal that in that tender there were 2

bidders whose bids were rejected, hence the tender was cancelled. Thus, occasion for giving any opportunity to the respondent No. 1 to match bid did not arise. Therefore, from this it cannot be inferred that to deprive the respondent No. 1 of any right, the said tender was cancelled.

18. It is worth noting in the earlier tender with the same impugned clause respondent No. 1 had participated without any objection.

19. The record further reflects that the application under Section 9 filed by the respondent No. 1 was subsequently dismissed by the Commercial Court, Rajarhat, North 24 Parganas by the order dated 11.05.2022. The respondent No. 1 had never taken any steps to initiate the arbitration proceedings.

20. In the aforesaid background, when the respondent No. 1 had sent the request dated 13th of July, 2022 for issuance of No Dues Certificate (page 272 of CAN 1 of 2022), the appellant was justified in not issuing the no due certificate. That apart, the tender was issued on 27th of June, 2022. The request was made on 13th of July, 2022 and within the short time on 18th of July, 2022 the present writ petition was filed. In these circumstances, no adverse inference can be drawn against the appellant.

21. It is worth noting that the respondent No. 1 had submitted the bid in response to the tender dated 27.06.2022 and simultaneously had also challenge the tender condition. Therefore, the appellant is justified in raising the ground that the respondent No. 1 is estopped from challenging the tender condition after participating in the tender.

22. Legal position is also well settled that the scope of interference in tender matter or tender condition is limited. Hon'ble Supreme Court in the matter of **N.G. Projects Limited vs. Vinod Kumar Jain and Others** reported in (2022) 6 SCC 127 has taken note of the earlier judgment on the point and has reiterated that it is for the authority inviting the bids to see whether the bidder satisfies the tender conditions and that the Court should be reluctant to interfere with the contracts for want of necessary expertise. It has also been held that the approach of the Court should be not to find fault with magnifying glass in its hands. Hon'ble Supreme Court in this regard has held that:

“13. This Court sounded a word of caution in another judgment reported as *Silppi Constructions Contractors v. Union of India*, wherein it was held that the courts must realise their limitations and the havoc which needless interference in commercial matters could cause. In contracts involving technical issues, the courts should be even more reluctant because *most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain*. As laid down in the judgments cited above, the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. The courts must also not interfere where such interference would cause unnecessary loss to the public exchequer. It was held as under : (SCC p. 501, paras 19-20)

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has

cautioned time and again *that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters*. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts, but this discretionary power must be exercised with a great deal of restraint and caution. *The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.*

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court

does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case.”

(emphasis supplied)

14. In *National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd.*, this Court sounded a word of caution while entertaining the writ petition and/or granting stay which ultimately may delay the execution of the mega projects. It was held as under : (SCC para 48)

“48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses

and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.”

15. In *Uflex Ltd. v. State of T.N.*, this Court stated that the enlarged role of the Government in economic activity and its corresponding ability to give economic “largesse” was the bedrock of creating what is commonly called the “tender jurisdiction”. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Court held as under: (SCC pp. 173-74 & 189-90, paras 2-3 & 42)

“2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, 'attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted'.

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42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular* and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.” (emphasis supplied)

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22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids.

Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer

twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

23. In the matter of **Agmatel India Private Limited vs. Resoursys Telecom and Others** reported in (2022) 5 SCC 362, Hon’ble Supreme Court has laid down the relevant principles in respect of interpretation of tender document and has held that the authority that authors the tender document is the best person to understand and appreciate its requirement and its interpretation should not be second guessed by a Court in judicial review proceedings. Hon’ble Supreme Court in this regard has held that:

“26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.”

24. In the matter of **National High Speed Rail Corporation Limited vs. Montecarlo Limited and Another** reported in (2022) 6 SCC 401, the Hon’ble Supreme Court has held that after knowing terms and conditions of the tender process and participating in the process it is not open to the bidder to raise grievances in respect of the clauses.

25. It is also worth noting that learned Single Judge in the present case has found that the clause 3(h) was tailor made to oust the writ petitioner but the said clause is uniformly applicable to all the bidders and the said clause was existing in the earlier tender also wherein the writ petitioner had participated without any objection. Hon'ble Supreme Court in the matter of Balaji Ventures Pvt. Ltd. vs. Maharashtra State Power Generation Company Ltd. and Another by order dated 11th of February, 2022 passed in SLP (C) 1616 of 2022 considering the similar issue has held that:

“5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

5.2 In the case of **Silppi Constructions Contractors vs. Union of India**, (2020) 16 SCC 489, it is observed in para 20 as under:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming

public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

5.3 In the case of **Montecarlo Limited vs. National Thermal Power Corporation Limited**, (2016) 15 SCC 272, it is observed and held that the tender inviting authority is the best person to understand and appreciate its requirement and tender documents, so long as there are no mala fides/arbitrariness etc. It is further observed and held that the Government must have freedom of contract and such action can be tested by applying Wednesbury principle and also examining whether it suffers from arbitrariness or bias or mala fides.”

26. The issue involved in the present case is similar to the one involved in above case.

27. So far as the judgment in the matter of **Poddar Steel Corporation vs. Ganesh Engineering Works and Others** reported in (1991) 3 SCC 273 relied upon by the learned Counsel for the

respondent is concerned, that was a case of waiver of technical compliance of the tender condition by the government. Hence, the Hon'ble Supreme Court considering the essential conditions of eligibility and subsidiary conditions has upheld the right of the government to waive the technical compliance of the tender conditions. Therefore, no benefit can be extended to the writ petitioner on the basis of the judgment.

28. The above analysis clearly leads to the conclusion that on combine consideration of the fact of this case as also the tender conditions, the condition 3(h) is neither arbitrary nor unreasonable. The facts of the case also do not indicate that the condition was tailor made to oust the writ petitioner. In view of limited scope of jurisdiction of judicial review, learned Single Judge ought not to have set aside the NIET. Hence, we are unable to sustain the judgment of the learned Single Judge which is accordingly set aside.

29. It has been pointed out by the learned Counsel for the appellant that the matter is at the stage of opening the technical bid, therefore, we permit the appellant to proceed with the tender and take further steps in accordance with law.

30. The appeal is accordingly allowed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
09.09.2022

PA(SS)

(A.F.R./N.A.F.R.)