

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

W.P.A. No. 21351 of 2021

Praxair India Private Limited
Versus
Central Vigilance Commissioner & Ors.

Mr. Jayanta Kumar Mitra, Sr. Advocate,
Mr. Sayak Chakraborti.

...For the petitioner.

Mr. Lakshmi Kr. Gupta, Sr. Advocate,
Mr. Arjun Ray Mukherjee,
Ms. Saheli Mukherjee.

...For the SAIL.

Mr. Kishore Datta, Sr. Advocate,
Mr. Neelesh Choudhury,
Ms. Anuradha Poddar,
Mr. Dheeraj Nair,
Ms. Vishrutyi Sahani.

...For the respondent no.7.

Hearing Concluded On : 09.03.2022

Judgment On : 15.03.2022

Rajasekhar Mantha, J.

FACTS:

1. The petitioner challenges a tender allocation process for setting up of a Cryogenic Oxygen manufacturing facility at Durgapur Steel Plant (DSP) with a capacity of 1250 TPD on a Build-Own-Operate (BOO) basis.
2. The brief facts of the case are that in or about December 2020, a Notice inviting “Expression of Interest” (EOI) was published by the Respondent No. 2, M/s Steel Authority of India Limited (SAIL). About five bidders, namely, Praxair India Private Limited (the writ petitioner), Ellenbarrie Industrial Gases Ltd., M/s. Nova Air, M/s. Air Liquide India Limited, M/s. Inox Air Products Pvt. Ltd, showed interest.
3. The existing Cryogenic Oxygen Plants of the SAIL at DSP and Bhilai Steel Plant (BSP), functioning on BOO basis, are already being operated by the writ petitioner and the said M/s Inox respectively. M/s. Inox was also operating an Oxygen Plant on a BOO basis at the steel plant at Bokaro (BSL) while M/s. Linde AG was operating such Oxygen plant at Rourkela Steel Plant (RSP) of the SAIL. Negotiations went on between SAIL and the said persons and in or about 17th June 2021, Notice Inviting Tenders (NIT) was published.
4. Corrigenda were issued by SAIL to the NIT from time to time, beginning from 6th July, 2021 until 26th October, 2021, extending the

last date for submission of tenders and postponing of the tender opening. By a corrigendum dated 30th September, 2021, the eligibility/bid qualification criteria was diluted and relaxed and the time for submission of bid extended until 8th October, 2021.

5. After the NIT was published, on this 5th of July 2021, geotechnical investigation and survey report was uploaded and the Tender Opening Date (TOD) was extended to 16th July, 2021. M/s. Ellenbarrie; M/s. Nova Air did not meet the eligibility criteria and M/s. Air Liquide India Limited, withdrew from the race. Detailed bid discussions were continuing with the petitioner and one M/s. Inox Air Products Pvt. Ltd. The writ petitioner and Inox demanded several alterations and/or deletions in the Clauses of the NIT which had Techno-commercial and legal implications for SAIL/DSP. In the meantime, one M/s. Air Water India Pvt. Ltd. (the 7th Respondent) entered into the fray and submitted the bid on 19th August, 2021. Neither the writ petitioner nor the said M/s Inox submitted any bids. On the contrary, they started to demand more favourable terms and prayed for extension of time to submit bids.
6. At the request of the petitioner and the said Inox, the due date for bidding was extended to 27th August, 2021. With a view to further accommodate the petitioner and the said Inox and at their instance, a technical team for DSP visited the steel plant at Bokaro (BSL), where a similar 2000 TPD Cryogenic Oxygen Plant was being set up. A large number of changes were incorporated to the NIT to facilitate bid

submission by the writ petitioner and the said Inox. The petitioner still did not agree with some clauses of the NIT, namely, security deposit, Supplementary Price, power cost, water cost, extension of the force majeure clauses and termination. Such clauses were similar to those in the BSL Tender.

7. Despite extension of the bid submission date up to 27th September, 2021 (4th extension), the petitioner and the said Inox remained adamant about the changes demanded and did not submit any bids. Such obstinacy was unduly delaying the project and the tendering process. The respondent no. 2 felt that the terms demanded by the petitioner and Inox significantly diluted M/s SAIL's interests, and any further dilution would be detrimental to the interest of the DSP. The only bidder in the fray, who actually submitted a bid on 19th August, 2021, sought clarification on the tender terms and the eligibility criteria.
8. After detailed discussions, SAIL modified the eligibility criteria making it broad-based and more inclusive and extended the last date for submission of bids to 8th October, 2021 (5th Extension). As on the said date, only the 7th respondent's bid was the only one available. The relaxation of eligibility criteria validated the bid of the 7th respondent who was not eligible as per the original eligibility criteria. The petitioner and the said Inox continued to be eligible to participate. Instead of submitting any bid from their side they continued to protest

the relaxation of eligibility criteria which facilitated the entry of the 7th respondent.

9. While the relaxation of the eligibility criteria could not, in any way, have prejudiced, prevented or disqualified the petitioner or the said Inox, yet they chose not to offer any bid. The eligibility criteria was relaxed in terms of clause 16.2 of the NIT. With a view to accommodate the petitioner and the said M/s. Inox as also to explore the market in general for the purpose of ascertaining if any new or other bidders were interested in the project, the Tender Opening Date (TOD) was extended until 25th October, 2021 (6th Extension).
10. In a reply to a letter of the writ petitioner protesting against the dilution of the eligibility criteria dated 7th October, 2021, the SAIL dealt with the petitioner's grievances and called upon the petitioner to submit a bid vide letter dated 7th October, 2021. The petitioner did not bother to submit any bid. Despite whereof, the respondent extended the last date of bid submission to 3rd November, 2021 on the 26th of October, 2021 (7th extension). The writ petitioner only went on demanding replies to its e-mails without submitting any bid.
11. The entire procedure followed by SAIL (DSP) in this subject tender process came to be reviewed by a team of "Independent External Monitors" (IEM) of SAIL. The said monitors in the 43rd meeting held on the 25th of November, 2021 after conducting a threadbare review of the tender process, the contentions of the writ petitioner and the said M/s. Inox, approved and endorsed the entire tender allocation

procedure adopted by DSP. The contract under the tender has since been awarded to the 7th respondent.

ARGUMENTS ON BEHALF OF THE PETITIONER:

12. Mr. Jayanta Mitra, Ld. Senior Advocate appearing for the petitioner, by reference to the decision of the Supreme Court in the case of **Ramana Dayaram Shetty Vs. The International Airport Authority of India and Ors.** reported in **[1979] 3 SCC 489**, would argue that the relaxation of the eligibility criteria to accommodate the 7th respondent would amount to changing the rules after the game has begun. Such change, according to him, is aimed specifically at accommodating the 7th respondent. It is argued that the procedure adopted by the SAIL is unfair and illegal. It is argued that the relaxation of eligibility criteria would benefit the SAIL by allowing the inclusion of the 7th respondent in the fray. Such inclusion however, in the midst of the tendering process would deny a large number of other players who could have been eligible under the relaxed criteria from participating in the distribution of State largesse. The SAIL should not behave like a private individual in awarding of contracts since the procedure adopted by the SAIL in the instant case is arbitrary and capricious.
13. The decision of the Supreme Court in the case of **Food Corporation of India v. Kamdhenu Cattle Feed Industries** reported in **(1993) 1**

SCC 71 is cited and it is argued that if SAIL wanted to change the terms and conditions after the tendering process had begun, the only option left was to cancel the NIT and initiate a fresh tender process.

14. Mr. Mitra lastly placed reliance on the case of **W.B. SEB, Vs. Patel Engg. Co. Ltd.** reported in **(2001) 2 SCC 451**. It is argued that whenever the terms of a NIT are relaxed, justifiable doubt is created in the minds of the bidders. In an international competitive bid, there is no scope of relaxation of any terms to benefit any tenderer.

ARGUMENTS ON BEHALF OF THE RESPONDENTS:

15. Mr. L. K. Gupta, Ld. Counsel appearing for the respondents, argued that it would be incorrect to say that the rules have been changed after the game has begun, since the time to submit bids was not closed. The changes effected were in the experience criteria and the financial turnover requirement of the NIT. The same could not prejudice the petitioner in any way. The petitioner did not submit any bid despite being provided multiple extensions over an inordinate period of time. Placing reliance on the decision of the Supreme Court in the case of **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)** reported in **(2016) 8 SCC 622**. It is submitted that the essential terms of the NIT can be changed by the employer with inherent authority, if the deviation is made applicable to all bidders and potential bidders.

16. The 7th respondent withdrew its bid on the same day it had submitted it i.e. on 19th August, 2021 and later submitted a fresh bid and hence did not act illegally. The bid qualification criteria was modified and altered on 30th September, 2021. The last date for submission of bids was on 3rd November, 2021. The delay in filing the writ petition i.e. on 23rd November, 2021 is evidence of the gross delay in challenging the acts of SAIL, which should in and of itself be grounds for rejecting the writ petition.
17. Placing reliance on the General Instructions Procurement and Project Management dated 29th October, 2021 issued by the Ministry of Finance, it is argued that merely because a single bid remains in the fray would not be a ground for retendering. It is submitted that retendering need not be ordered when the NIT is well advised, sufficient time is given for submission of bids, and the qualification criteria is not unduly restrictive. The minutes of the 43rd meeting of IEM is also placed before this Court to indicate that the procedure adopted by the SAIL has been vindicated.
18. Mr. Kishore Datta, Ld. Senior Advocate, appearing for the 7th respondent (the successful bidder), sieved through the entire facts to indicate the questionable conduct of the petitioner in the bidding process. It is submitted that the petitioner was only bargaining with the respondent SAIL since the beginning of the tender process. A person who chooses not to participate in a bidding process is not entitled to challenge the terms of the NIT. On the credentials of his

client, Mr. Dutta submits that in the year 2018-19, the turnover of the Respondent no. 7 was low because it had just started the business. In the year 2019-20, such turnover increased to 480 crores for the 2021 it reached 870 crores. On an average for the earlier three years, therefore, the Respondent No.7, had a turnover of 430 crores with a net worth 2563 crores in the year 2021.

19. In support of the argument that a person who does not submit a bid, does not have locus to challenge the NIT, reliance is placed on the decision of the Supreme Court in the case of **NHAI v. Gwalior-Jhansi Expressway Ltd.** reported in **(2018) 8 SCC 243**. On the same proposition is cited the case of **Subir Ghosh Vs. State of West Bengal and Ors.** reported in **2020 SCC OnLine Cal 2213 (DB Cal)** and in the case of **Renesco India Pvt. Ltd. Vs. Eastern Coalfields Limited & Ors.** reported in **2018 SCC OnLine Cal 4733 (DB Cal)** and the case of **A.M. Yusuf Vs. Mumbai Municipal Corporation & Ors.** reported in **2008 SCC OnLine Bom 1186 (DB Bom)**.
20. Placing reliance on a decision of the Supreme Court in the case of **Maa Binda Express Carrier v. North-East Frontier Railway** reported in **(2014) 3 SCC 760** and in the case of **Jagdish Mandal Vs. State of Orrisa** reported in **(2007) 14 SCC 517**, it is argued that terms of an NIT in a tender process are not subject to judicial review.

ISSUES FOR CONSIDERATION:

21. Having heard counsel for the parties at length, the following questions have come up for consideration:

- (a) Whether an employer is debarred from relaxing the eligibility criteria for a tender after the tender consideration process has begun, and whether other bidders have been prejudiced by said relaxation, in the facts of the instant case?
- (b) Whether a person who has not even submitted a bid in the tender process despite being eligible, notwithstanding change of eligibility criteria, has the locus standi to challenge the tender process?

DISCUSSIONS ON POINT (a) -RELAXATION OF ELIGIBILITY CRITERIA:

22. In **Ramana case (supra)**, the Hon'ble Supreme Court has indeed laid down that change in eligibility criteria after the opening of the tender process is not something that can be countenanced. Such change would have the effect of preventing other eligible bidders from participating in the tender process. However, the dicta laid down in the Ramana decision has been watered down by the Hon'ble Supreme Court, with a large number of exceptions. Some of these judgments are discussed below.

23. Firstly, in the case of **Sterling Computer Ltd. vs. M & N Publications Ltd.** reported in **(1993) 1 SCC 445**, the apex Court observed that in decisions involving contractual/commercial transactions, a certain amount of freedom to "play in the joints" must

be allowed to the State, and the reasons for the same can be observed in **Para 12** as follows:

“12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of “play in the joints” to the executive.”

(emphasis supplied)

24. In **Tata Cellular vs. Union of India** reported in **AIR 1996 SC 11**, in **para 94** noted that certain principles are to be followed in determining whether the Court should subject the tender allocation process, being a contractual/commercial decision to judicial review. Furtherdeveloping on the dicta in *Sterling* (supra), the Court reiterated on the need to allow tender terms to be left to the determination of experts, while outlining that the Court’s unnecessary interference

would be burdensome on the employer. To that end, **Para 94** of the said judgment reads as follows:

“The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

(emphasis supplied)

25. In the case of **Jagdish Mandal vs. State of Orissa** reported in **(2007) 14 SCC 517** while considering the scope of judicial review of tender processes and in award of commercial contracts by the State, the apex Court categorically held that the purpose of judicial review was limited to ensuring that the administrative action is lawful, rather than to value whether it is commercially sound, as that falls into the domain of contractual disputes. This can be observed in **Para 19** as follows:

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold.”

(emphasis supplied)

26. In **A.M. Yusuf vs. Mumbai Municipal Corporation & Ors.** reported in **2008 SCC OnLine Bom 1186** while noting that the burden to show that the Government action was arbitrary or unauthorized lay on the petitioners in calling for judicial review, the Bombay High Court in **Para 13** held as follows:

“13. Viewed even from this angle, the Court can hardly find any error or omission, intentional or otherwise. The terms of the tenders and even altered the conditions were uniformly applied while making two different groups i.e. different deposits by all contractors falling in Class ‘A’ and different classes being all other applicants. The only condition which was varied related to higher deposit and it provided requisite time of one week to the parties. This is not a deviation of the terms which have either resulted in discriminatory treatment of the applicants by the Corporation or has unreasonably affected rights of the parties. Every immaterial alterations would not justify Court's intervention. It is obligatory upon the petitioner to show clear violation of a right of equality before it can raise a challenge on the foundation of Article 14 of the Constitution of India. The Corporation relied upon its earlier circular dated 11th November, 2008 which had made a general direction in relation to class “A” contractors and exempted them from

paying E.M.D. in excess of Rs. 7.5 lakhs deposit if already lying with the Corporation. Thus, we see no merit even in this contention of the petitioner relating to discrimination of the action of the Corporation being arbitrary.”

27. Additionally, in **Maa Binda Express Carrier vs. North-East Frontier Railway** reported in **(2014) 3 SCC 760**, the Supreme Court observed that the bidders participating in the tender process are not automatically entitled to be awarded the tender based on price, other specific criteria, but only to a fair, non-discriminatory process that is equal and open to all, and that judicial review is an intrusion that will only be necessitated if the latter does not exist. The relevant **Para 8** has been reproduced below:

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

(emphasis supplied)

28. Finally, in **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)** reported in **(2016) 8 SCC 622**, the Supreme Court was called upon to determine whether certain terms of the NIT were essential or not, and whether that decision was to be left to the employer or made subject to judicial review. To that end, the Supreme Court noted as follows:

“48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.”

(emphasis supplied)

29. From a combined reading of the abovementioned dicta, it is clear that an employer has to be permitted, to “play in the joints”. An employer must be allowed due leverage even in the process of distribution of State Largess. If the terms and conditions of the tender are altered after the process has begun, but with due notice to one and all and ensuring a level playing field and equal participation to all, the same cannot be interfered with by the Courts.
30. In the instant case, it appears that the respondent no.7, the writ petitioner, and one M/s. Inox remained in the fray until September 2021. M/s. Inox and the writ petitioner were insisting upon a change in the techno-commercial terms. The respondents continued to oblige

and entertain the same. As on the date of change of eligibility criteria, i.e. 25th September, 2021, neither the writ petitioner nor M/s. Inox had submitted any bid. The 7th respondent who had submitted a bid earlier on 19th August, 2021 withdrew it on the same day and submitted afresh on 8th October, 2021 after the relaxation of terms. The relaxed terms were also duly communicated to all tenderers and all major players in the field of Cryogenic Oxygen production. None of such persons came forward expressing any new or changed interest in the project.

31. The relaxation of eligibility criteria did not and could not have prejudiced either the writ petitioner or any other intending/potential bidders. No other interested bidders, despite sufficient knowledge of the new and relaxed terms, came forward to submit any bid. There is therefore no infirmity in the procedure adopted by M/s SAIL in conducting the aforesaid tender process. The petitioners did not and in fact, refused to submit any bids.
32. Admittedly, after receiving complaints from the petitioner, an Independent External Monitors (IEM) of SAIL had reviewed the entire tendering process threadbare. The minutes of the meeting of the IEM clearly vindicates the procedure adopted by the SAIL. The changes in the eligibility criteria appear to be wholly and completely justified in the facts of the case. The writ petitioner and the said M/s. Inox who are already generating cryogenic Oxygen in various steel plants of the SAIL and the DSP itself, were only attempting to extract favorable

terms for a period of nearly nine months from M/s. SAIL. The last of the changes to the techno-commercial conditions demanded by the writ petitioner and the said M/s. Inox were admittedly wholly prejudicial to the employer SAIL.

33. The relaxation terms only facilitated the entry of the 7th respondent into the fray. The writ petitioner already having a Cryogenic Oxygen plant at DSP itself and operating another plant at BSP could have stood with equal, if not with better credentials, than the 7th respondent. The petitioner however, chose not even to submit any bid for a period of 1 year and/or continued to demand terms favorable to them and to the detriment of SAIL. The relaxation of eligibility criteria and the entry of the 7th respondent could not have, therefore, in any way, prejudiced the writ petitioner.
34. It is crucial to note that the said change of eligibility criteria was duly and sufficiently advertised globally. No third party has been deprived of any right to participate. The relaxation of eligibility criteria in the instant fact of the case, is neither illegal nor arbitrary and therefore does not call for any interference whatsoever from this Court. Reference in this regard is made to paragraph 56 to 59 of the decision of the Supreme Court in the case of **B S N Joshi and Sons VS Nair Coal Services Ltd reported in (2006) 11 SCC 548.**

“56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the

Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

57. This Court in *Guruvayoor Devaswom Managing Committee v. C.K. Rajan* [(2003) 7 SCC 546 [**Ed.**: See para 50(x) at p. 571]] observed [**Ed.**: *Chairman & MD, BPL Ltd. v. Gururaja*, (2003) 8 SCC 567, p. 588, para 30.] :

“30. Dawn Oliver in *Constitutional Reforms in the UK under the heading ‘The Courts and Theories of Democracy, Citizenship and Good Governance’* at p. 105 states:

‘However, this concept of democracy as rights-based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risks for the judges—and for the public. Courts may interfere inadvisedly in public administration. The case of *Bromley London Borough Council v. Greater London Council* [(1983) 1 AC 768 : (1982) 1 All ER 129 : (1982) 2 WLR 62 (HL)] is a classic example. The House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions, but were accused of themselves misunderstanding transport policy in so doing. The courts are not experts in policy and public administration—hence Jowell’s point that the courts should not step beyond their institutional capacity (Jowell, 2000). Acceptance of this approach is reflected in the judgments of Laws, L.J. in *International Transport Roth GmbH v. Secy. of State for the Home Deptt.* [2002 EWCA Civ 158 : (2002) 3 WLR 344] and of Lord Nimmo Smith in *Adams v. Lord Advocate* [Court of Session, Times 8-8-2002] in which a distinction was drawn between areas where the subject-matter lies within the expertise of the courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. If the courts step outside the area of their institutional competence, the Government may react by getting Parliament to legislate to oust the jurisdiction of the courts altogether. Such a step would undermine the rule of law. The Government and public opinion may come to question the legitimacy of the judges exercising judicial review against Ministers and thus undermine the authority of the courts and the rule of law.”

(See also *State of U.P. v. Johri Mal* [(2004) 4 SCC 714] .)

58. In *Jagdish Swarup's Constitution of India*, 2nd Edn., p. 286, it is stated:

“It is equally true that even in contractual matters, a public authority does not have an unfettered decision to ignore the norms recognised by the courts, but at the same time if a decision has been taken by a public authority in a bona fide manner, although not strictly following the norms laid down by the courts, such decision is upheld on the principle that the courts, while judging the constitutional validity of executing decisions, must grant a certain measure of freedom of ‘play in the joints’ to the executive.”

59. Recently, in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.* [(2005) 6 SCC 138], upon noticing a large number of decisions, this Court stated: (SCC p. 148, para 15)

“15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617] and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.”

(See also *Noble Resources Ltd. v. State of Orissa* [(2006) 10 SCC 236 : (2006) 9 Scale 181].)

35. In the case of **Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors.**, reported in **(1999) 1 SCC 492**, while considering whether granting a relaxation to the tender conditions/norms was permissible or not, the Court in **Para 15** noted as follows:

“15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.”

(emphasis supplied)

36. In **Shobikaa Impex (P) Ltd. v. Central Medical Services Society** reported in **(2016) 16 SCC 233**, in **Para 20**, it was noted that:

“...the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the

State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. “

(emphasis supplied)

37. In the backdrop of the above, this Court is equally unable to accept the argument of the petitioner that the respondent M/s SAIL ought to have called for fresh tender for having chosen to relax eligibility criteria as already discussed hereinabove. Such relaxation has neither prejudiced the petitioner nor has prevented any new player or intending bidder from entering into the fray. There was absolutely no prejudice caused to any person including the writ petitioner by reason of such relaxation.

DISCUSSIONS ON POINT (b) - LOCUS STANDI OF THE PETITIONER:

38. Having adequately addressed why relaxation of eligibility criteria by M/s SAIL was lawful and permissible in the facts of the case, this Court is also inclined to examine as to whether the petitioner has locus standi to have filed the writ petition challenging the tendering process in the first place.
39. Having found that their bargaining power might have been weakened with the entry of the 7th respondent, the petitioner did not even bother to submit any bid. One could understand the petitioner having submitted a bid, and then complained of any prejudice in the tender having been awarded to the 7th respondent. Not having submitted the

bid altogether, the petitioner has deliberately and willfully chosen to exclude themselves from the fray. The petitioner has non-suited itself from the tender process. The petitioner could not, therefore, turnaround and challenge any single term or condition in the NIT.

40. In the case of **NHAI v. Gwalior-Jhansi Expressway Ltd.** reported in **(2018) 8 SCC 243**, the apex Court in **Para 18** noted as follows:

“18..... The objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or value for money. The plain wording of the eligibility clause in the tender documents and the incidental stipulations make it explicit that the respondent was required to participate in the tender process by submitting its sealed bid (technical and financial). The fact that a deeming clause has been provided in the tender document that if the respondent was to participate in the bidding process, it shall be deemed to fulfill all the requirements of the tender clauses 3 to 6 of the RFP, being the existing concessionaire of the Project, does not exempt the respondent from participating in the tender process; rather the tenor of the terms of the documents made it obligatory for the respondent to participate in the tender process to be considered as a responsive bidder, along with others. Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not been challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever. Only the entities who participate in the tender process pursuant to a tender notice can be allowed to make grievances about the non-fulfillment or breach of any of the terms and conditions of the concerned tender documents. The respondent who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions. At the culmination of the tender process, if the respondent had not participated, in law, the offer submitted by the eligible bidders is required to be considered on the basis of the stated terms and conditions. Thus, if the claim of the respondent was to be strictly adjudged on the basis of the terms and conditions specified in the subject tender document, the respondent has no case whatsoever.”

(emphasis supplied)

41. In **Subir Ghosh Vs. State of West Bengal and Ors.** reported in **2020 SCC OnLine Cal 2213 (DB Cal)**, the Court was concerned with an interim order passed in a writ petition challenging the tender process pertaining to delivery of cooked diet at government hospitals in the district of Nadia. The facts therein being similar to those in the instant case, it is important to note that the Court therein, in **Para 4 and 5**, had held as follows:

“4. The more important factor is that the tender process in this case opened sometime in March, 2019 and the closing date for submitting online bids was April 1, 2019. The writ petition was filed in January, 2020. Though it is submitted on behalf of the writ petitioner that the time to submit the bids was extended, no specific date in such regard is indicated. What is apparent is that the writ petitioner did not participate in the bidding process and yet chose to challenge the same.

5. It is possible that a prospective bidder finds the terms of the tender documents to be unfair or illegal and challenges the same; but such challenge has to be before the time to put in the bids is closed. At any rate, if a bid is made and the bid is thrown out on an illegal or unfair ground contained in the tender documents, even then, a challenge can be fashioned. But a person who has not participated in the bidding process at all cannot challenge the tender conditions on any ground whatsoever. This admitted aspect of the matter escaped the attention of the Single Bench while passing the impugned order of January 15, 2020.”

(emphasis supplied)

42. The questions framed are answered as above. Having addressed the aforementioned questions, this Court finds it necessary to look into the conduct of the writ petitioner in the entire tender allocation process and in filing the instant writ petition, which has caused inordinate delay in the exercise of the functions of an instrumentality of the State.

43. It is surprising to note how SAIL has allowed itself to be held to ransom by the petitioner and the said M/s. Inox. This Court's mind is not free from doubt that the petitioner and other bidders being established players in the field of Cryogenic Oxygen production were trying to get a stranglehold on M/s. SAIL and to blackmail it to submit to their terms to the detriment of the latter's interests.
44. Admittedly, a Notice Inviting EOI for the subject matter of the Tender was issued in December, 2020. The tender terms, particularly on technical specifications, were substantially altered in course of the negotiations with the petitioner and the said M/s. Inox. The writ petitioner and the said M/s. Inox, by July-August, 2021, having realized that there are no players, other than themselves, may have resorted to demanding terms that border on extortion.
45. The terms demanded were clearly detrimental to the interest of M/s. SAIL. The petitioner did not submit any bid whatsoever and has filed the instant writ petition nearly a month after the granting of the 7th extension of deadline for submission of tender bids, being 26th October, 2021. The other intending bidder, M/s. Inox has not even bothered to challenge the SAIL or even participate in the instant proceedings. The Court's mind is not free from doubt that the petitioner and the said M/s. Inox may have formed an unholy alliance with a view to extract onerous terms to the detriment of SAIL in furtherance of deriving wrongful benefits.

46. Reference in this regard is made to paragraph 22 of the decision of the Supreme Court in the case of **Jagdish Mandal Vs State of Orissa** reported in **(2007) 14 SCC 517**.

*“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. **Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted.** (Emphasis added). Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*

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

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

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

47. The writ petition is speculative and harassive and is liable to be dismissed with costs assessed at Rs.5,00,000/- (Five Lacs Only) to the Respondent No. 2. Costs are imposed in view of the conduct of the petitioner as related hereinabove, and to account for the prejudicial impact on the commercial interests of the DSP caused by the delay to the project for over a year.
48. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)