ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 13996 OF 2022

In the matter of an application under Article 226 of the Constitution of India.

AFR

Consortium of Thermopads Pvt. Ltd.
and Thermo Systems Private Ltd.
and others ..... Petitioners

-Versus-

National Aluminium Company
Limited (NALCO) and others ..... Opp. Parties

For Petitioners : M/s. Goutam Mukherji, Senor Advocate along with M/s. S.S. Padhy, A.S. Mohanty and S. Jena, Advocates.

For Opp. Parties : Mr. Sanjit Mohanty, Senior Advocate along with M/s. Pami Rath, Ipsit Acharya, J. Mohanty, S. Guman Singh, Sagarika Sahoo and K. Khuntia Advocates [O.P. Nos. 1 & 2].

M/s. Jishnu Saha, S.S. Kashyap, Chintu Kumar Agarwal and Amit Kumar Nag, Advocates [O.P.3]

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MR. JUSTICE SANJAY KUMAR MISHRA

Date of Hearing: 25.07.2022::Date of Judgment: 03.08.2022

DR. B.R. SARANGI, J. The Petitioners have filed this Writ Petition seeking to quash the selection of Opposite Party No.3, pursuant to the Notice Inviting Tender (NIT) dated 15.09.2021 under Annexure-2, and the decision/opinion of Independent External Monitor (IEM) dated 24.02.2022 under Annexure-6, so also the Letter of Intent received by Opposite Party No.3 dated 09.05.2022. The Petitioners have further prayed to direct Opposite Parties No.1 and 2 to finalize the tender process, pursuant to the NIT dated 15.09.2021 under Annexure-2, by evaluating the Financial Bid of Petitioner No.1-Consortium as per the NIT, within a stipulated period.

2. The factual matrix of the case, in brief, is that Opposite Party No.2-Thyssen Krupp Industrial Solution (India) Pvt. Ltd., on behalf of National Aluminium Company Limited (NACLO), invited bid from the eligible Bidders for the work *"Mud Settling, Washing and Associated Facilitates Package Stream 5 of Alumina*

Refinery at Damanjodi (Bidding Document No.6695-CMG-G00-CA-0042)" vide NIT dated 15.09.2021. As per the NIT, the Bidders were to submit their bids only in hard copy to the Consultant-O.P. No.2 and no bid was to be uploaded in any web portal. The due date for submission of the bid, which was originally fixed to 13.10.2021, was extended to 10.11.2021, and the date of bid opening was extended to 11.11.2021, by issuance of corrigendum/addendum by Opposite Party Nos.1 and 2.

2.1 Petitioner No.1, which is the consortium of two Private Limited Companies, viz., M/s. Thermopads Private Ltd.-Petitioner No.2 and M/s. Thermosystems Private Ltd.-Petitioner No.3, was formed for the purpose of participating in the tender process. Petitioner No.1-Consortium, along with two other Bidders, including Opposite Party No.3-M/s. Tuaman Engineering Ltd., submitted their bids pursuant to the NIT dated 15.09.2021 and participated in the bidding process. The bids of Petitioner No.1-Consortium and Opposite Party No.3 were technically qualified. Clause-4.0 (A) of the NIT stipulates the minimum technical experience criteria which must be fulfilled by the Bidders in order to qualify for the work. The tender process was conducted in off-line mode, in which Petitioner No.1-Consortium and Opposite Party No.3 were technically qualified. But Petitioner No.1-Consortium came to know that Opposite Party No.3 in support of its technical experience, as provided in Clause-4.0 (A) of the NIT, had furnished one completion certificate dated 06.11.2013 issued by M/s Himadri Chemicals & Industries Limited (now M/s Himadri Specialty Chemical Limited). The said completion certificate refers to one Purchase Order dated 21.07.2011 issued by M/s Himadri Chemicals & Industries Limited to Opposite Party No.3. Therefore, Petitioner No.1-Consortium raised objection to such completion certificate furnished by Opposite Party No.3 and submitted a letter on 20.12.2021 to Opposite Party No.1-NALCO contending therein that such completion certificate furnished by Opposite Party No.3 ought not have been entertained in satisfaction of the eligibility criteria, as the said certificate was issued by one of its

Group Company, namely, M/s Himadri Chemicals & Industries Limited (now M/s Himadri Specialty Chemical Limited).

2.2 Opposite Party Nos. 1 and 2, the Tendering Authority, instead of taking a decision on the specific complaint made by Petitioner No.1-Consortium, went ahead with the tender process and opened the Financial Bid on 13.04.2022, in which Opposite Party No.3 was declared as successful Bidder. Consequently, a Letter of Intent was issued in favour of Opposite Party No.3 on 09.05.2022. Therefore, Petitioner No.1-Consortium approached this Court by filing W.P.(C) No. 11855 of 2022 highlighting the illegal and arbitrary manner of evaluation of tender by Opposite Party Nos.1 and 2 and sitting over the complaint of the Petitioner No.1-Consortium. During course of the hearing, learned Counsel appearing for the Tendering Authority-NALCO submitted that the grievance of Petitioner No.1-Consortium has been considered by the Independent External Monitor (IEM) and order thereon has been passed. A copy of such order was also furnished to the learned Counsel appearing for Petitioner No.1-Consortium in Court on that day. Consequentially, this Court, by referring to the decision of the IEM and its communication to Petitioner No.1-Consortium, disposed of the Writ Petition vide order dated 16.05.2022. Aggrieved by the order/opinion of the IEM as well as the decision making process of the Tendering Authority-Opposite Party Nos. 1 and 2, in qualifying the bid of Opposite Party No.3, the Petitioners have approached this Court by means of the present Writ Petition.

3. Mr. Goutam Mukherji, learned Senior Advocate appearing along with Mr. S.S. Padhy, learned Counsel for the Petitioners, contended that the experience certificate furnished by Opposite Party No.3 in support of its past experience, as required under Clause-4.0 (A) of the NIT, is not admissible in view of the clear and unambiguous bar provided under Clause-7.5 of the NIT. It is further contended that the IEM in its opinion/order dated 24.02.2022 has itself admitted that the Bidder-Opposite Party No.3, i.e. M/s Tuaman Engineering Limited and the

Company, which has issued the completion/experience certificate, i.e., M/s Himadri Chemicals & Industries Limited (now M/s Himadri Specialty Chemical Limited) are Group Companies and the Shareholders of the two Companies are blood relations, which is evident from the Work Order furnished by Opposite Party No.3 along with its bid and the Company Master Data downloaded from the website of the Ministry of Corporate Affairs. Therefore, the selection of Opposite Party No.3 as successful Bidder cannot be sustained in the eye of law.

3.1 It is further contended that the Petitioners have independently obtained Search Reports of practicing Company Secretary as to the direct and indirect relationship of Opposite Party No.3 and M/s Himadri Chemicals & Industries Limited so also other Group of Companies, which reveals that Promoter and Promoter Group of M/s Himadri Chemicals & Industries Limited are also directly and indirectly owners of Opposite Party No.3-Company and, as such, are Group Companies or Affiliates. Therefore, Opposite Party No.3 could not have participated in the process of tender and, as such, its selection is contrary to Clause-4.0 (A) read with Clause-7.5 of the NIT.

3.2 It is further contended that the Petitioners at no point of time have alleged regarding the authenticity or otherwise of the experience certificate furnished by the Opposite Party No.3, but the Petitioners have asserted that irrespective of the genuineness or otherwise of the experience certificate, Clause 7.5 of the NIT in clear and unambiguous term forbids consideration of experience certificate furnished by a Bidder for projects executed by the Bidder for its Parent/Affiliate/Group Company/ Subsidiary/ Fellow-Subsidiary/ Holding Company. Thereby, the IEM as well as the Tendering Authority have committed gross illegality in considering the experience certificate furnished by Opposite Party No.3. Consequentially, the Petitioners claim for cancellation of selection of Opposite Party No.3.

3.3 It is also contended that the IEM is a product of a Pre-Contract Integrity Pact agreed to by the Bidder and Opposite Party No.1-NALCO, as per the Guidelines issued by the Central Vigilance Commission (CVC), which forms part of the tender document. As per the said Integrity Pact, the role of IEM is limited to inquiry in case of an allegation of corruption, bribe, indulging in corrupt practice prior to, during and after currency of the contract. Therefore, it is contended that the complaint lodged by the Petitioner No.1-Consortium with Opposite Party No.1-NALCO pertains to fulfillment or otherwise of an eligibility criteria by a Bidder and has nothing to do with allegation of any corrupt practice. Therefore, Opposite Party No.1-Tendering Authority ought to have decided the complaint of Petitioner No.1-Consortium by itself and not guided by the opinion of the IEM, who has no jurisdiction to decide such complaint of the competing Bidders as per the NIT. Consequentially, the decision so taken by the IEM also cannot be sustained.

3.4 Learned Counsel for the Petitioners raised objection with regard to constitution of the Committee, which has issued the certificate, on the basis of which the

Work Order has been issued in favour of the Opposite Party No.3. As a consequence thereof, it has been prayed for quashing of the said document and allow the Financial Bid of the Petitioner No.1-Consortium to open for evaluation.

4. Mr. Sanjit Mohanty, learned Senior Advocate, appearing along with Mr. Ipsit Acharya and Mrs. Pami Rath, learned Counsel for Opposite Party Nos.1 and 2, vehemently refuted the contention raised by the Petitioners and contended that three bids, including the bids of the Petitioner No.1-Consortium and Opposite Party No.3, were received pursuant to the NIT dated 15.09.2021. In the evaluation process of Technical Bid, regarding certificate of past experience submitted by Opposite Party No.3, with reference to NIT Clause-7.5, a grievance petition dated 20.12.2021 was received from the Petitioner No.1-Consortium, which was initially examined by the Company Secretary of the Opposite Party No.1 and after seeking clarification from Opposite Party No.3, the same was referred to the IEM on

27.01.2022, which had afforded opportunities to the representatives of Petitioner No.1-Consortium, Opposite Party No.1 and Opposite Party No.3 to present their views on 07.02.2022 and after hearing them, the IEM submitted its Report on 24.02.2022. Based on the facts brought out by the IEM in its Report dated 24.02.2022, Company Secretary of NALCO, on 23.03.2022, gave views to accept the views of IEM, as it is an independent person appointed under the CVC Guidelines. Its role is to monitor the tender and contracts. It is envisaged as an alternative mechanism for dispute resolution between stakeholders. Its mandate is to give independent views and objective. After obtaining the views of IEM on 08.04.2022 and views of Company Secretary on IEM Report, the Tender Evaluation Committee (TEC) submitted its recommendations to the Competent Authorities to open the Price Bids of Opposite Party No.3 and Petitioner No.1-Consortium. Basing on the advice of the IEM and views of Company Secretary for accepting the views of the IEM and recommendation of Tender Evaluation Committee, the Competent Authority approved acceptance of Technical Bid of Opposite Party No.3 on 12.04.2022. Followed thereby, the second step of tender process, i.e., opening of Price Bid was done on 13.04.2022 in presence of the parties and accordingly, Opposite Party No.3 emerged as L1 Bidder, whereas Petitioner No.1-Consortium emerged as L2 Bidder. After opening of the Price Bid, the Petitioner No.1-Consortium came to know that Opposite Party No.3 has emerged as L1 Bidder and accordingly, knowing well that they were unsuccessful Bidder, made afterthought attempt to derail the award of contract by filing W.P.(C) No. 11588 of 2022, which was disposed of vide order dated 16.05.2022.

4.1 It is further contended that at the time of opening of Price Bid, the Petitioners were fully aware that Technical Bid of Opposite Party No.3 was accepted by NALCO and the Petitioners without any objection/demur participated in opening of Price Bid and only after becoming unsuccessful, made an attempt to frustrate the award of contract on flimsy ground. But, as a matter of fact, Opposite Party No.3 having become successful, the brief order of acceptance was issued on 02.05.2022 and agreement was executed on 06.06.2022.

4.2 It is further contended that the experience certificate of Opposite Party No.3 regarding the work executed does not contravene Clause-7.5 of NIT. The contention of the Petitioners that IEM has cognized direct & indirect relation of Opposite Party No.3 with M/s Himadri Chemicals & Industries Limited is not correct, and the assertion made to the effect that the tender of the Petitioners was rejected, is also not correct. In fact, the tender of the Petitioner No.1-Consortium was considered and declared as L2 Bidder, and as per the NIT, the contract was awarded to L1 Bidder, i.e., Opposite Party No.3. So far as objection raised by Petitioner No.1-Consortium with regard to validity of the experience certificate submitted by Opposite Party No.3, the same was considered and after initial views of the Company Secretary, the same was finally referred to IEM on 27.01.2022 and after advice of the IEM dated 24.02.2022 and views of the Company Secretary dated 23.03.2022, the Tender Evaluation Committee recommended that Petitioner No.1-Consortium and Opposite Party No.3 were technically qualified. The experience certificate submitted by Opposite Party No.3 was of 06.11.2013 for the work executed from 21.07.2011 to 06.11.2013, when M/s Himadri Chemicals & Industries Limited did not have any relation or control over the affairs of Opposite Party No.3.

4.3 It is further contended that the Petitioners have not approached this Court with clean hands. Certain material facts have been suppressed to the extent that even the Petitioner No.1-Consortium and Opposite Party No.3 were qualified in Technical Bid Evaluation and thereafter their Financial Bids were opened, whereas a statement has been made before this Court that the Financial Bid of Petitioner No.1-Consortium was not opened, which is not correct. Since Petitioner No.1-Consortium became L2, pursuant to opening of the Financial Bids, its bid was not accepted. Therefore, somehow or other, the Petitioners have tried to frustrate the tender process by taking frivolous plea, which cannot sustain in the eye of law.

4.4 It is further contended that earlier the Writ Petition filed by the Petitioners, bearing W.P.(C) No. 11855 of 2022, was disposed of vide order dated 16.05.2022, as the grievance of the Petitioners was considered by the Independent Authority called IEM. Thereby, no illegality or irregularity has been committed by the Authorities by taking help of an Independent Authority. Taking advantage of constitution of M/s Himadri Chemicals & Industries Limited, the Petitioners are trying to frustrate the award of tender in favour of Opposite Party No.3, which cannot be sustained in the eye of law.

4.5 It is further contended that the author of the tender document is to be taken as the best person to understand and appreciate its requirement. Therefore, there is little scope of the Court to interfere with the same, in exercise of the power under judicial review. Further, it is contended that technical evaluation or comparison by Court is not permissible in exercise of the judicial review. It has also been contended that Owner or Employer of a Project is the best person to understand and appreciate its requirement and interpret its document. Court shows due deference to interpretation so given. Therefore, there cannot be any perversity or mala fide intention to favour one Bidder. In view of such settled position of law, the claim of the Petitioners cannot be sustained in the eye of law. As such, the Writ Petition should be dismissed in limine.

4.6 It is emphatically contended that no specific allegation with regard to invalidity of the Bid on the ground of Group Company was ever raised. On perusal of the document under Annexure-4, dated 20.12.2021, it would be evident that the complaint made by the Petitioners was with regard to study the material facts and study the documents submitted by the contenders under qualification criteria strictly in the line of NIT clauses. But there was no specific allegation with regard to invalidity of the document produced by Opposite Party No.3. Therefore, the IEM, who is an Independent

Authority and whose assistance was taken by NALCO, has come to a definite conclusion that the experience certificate submitted by Opposite Party No.3 be accepted, as M/s Himadri Chemicals & Industries Limited, which has issued the experience certificate, does not come under the Group Company and, therefore, does not hit Clause 7.5 of the NIT. Even if the Company Secretary of the Company has made a statement and opined that it may be construed that both the Companies are Group Companies, but that *ifso facto* cannot be taken into consideration, when an Independent Authority, namely, IEM has expressed a different view than that of the Company Secretary, reason being the view taken by the Independent Authority has to be given due respect. As a consequence thereof, the contention raised by the Petitioners in regard to the same cannot be sustained and the same is liable to be quashed. Reliance has also been placed on the Search Report filed by the Petitioners. If that would be taken into consideration, the Petitioners do not satisfy the requirement. Therefore, Petitioner No.1-Consortium was not selected nor the work was awarded in its favour. Therefore, learned Counsel appearing for Opposite Party Nos. 1 and 2 claims for dismissal of the Writ Petition.

4.7 To substantiate his contentions, reliance has been placed on ***M/s Agmetel India Pvt. Ltd v. M/s Resoursys Telecom***, 2022 (2) SCALE 554, ***Montecarlo Ltd v. NTPC Ltd***, AIR 2016 SC 4946 and ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.***, AIR 2016 SC 4305

5. Mr. Jistnu Saha, learned Counsel appearing for Opposite Party No.3, supported the contention raised by Mr. Sanjit Mohanty, learned Senior Advocate appearing for Opposite Party Nos. 1 and 2, and also contended that the Opposite Party No.3, being successful Bidder, has already executed the agreement and, as such, there is no relationship between the Opposite Party No.3 with M/s Himadri Chemicals & Industries Limited. The Petitioner No.1-Consortium, being a fence sitter and having participated in the tender process, cannot assail the tender conditions on being unsuccessful in the Bid.

Consequentially, he states that the Writ Petition is liable to be dismissed.

6. This Court heard Mr. Goutam Mukherji, learned Senior Advocate appearing along with Mr. S.S. Padhy, learned Counsel for the Petitioners; Mr. Sanjit Mohanty, learned Senior Advocate appearing along with Mr. Ipsit Acharya and Mrs. Pami Rath, learned Counsel for Opposite Party Nos. 1 and 2 and Mr. Jistnu Saha, learned Counsel appearing for Opposite Party No.3 by hybrid mode, and perused the records. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties this Writ Petition is being disposed of finally at the stage of admission.

7. Before delving into the issue involved, for a just and proper adjudication of the case, the relevant provisions of the NIT are referred to.

> ***4.0 Bidder Qualification Criteria (BQC)***
>
> *Bidder must fulfil the minimum qualification criteria mentioned below in order to qualify for this Work. The Bidder shall submit with his Tender all necessary supporting documents in this respect.*
>
> *(A) Experience Criteria: Technical Experience Criteria:*

(a) Bidder must have successfully executed at least one package comprising of settlers /washers / clarifiers along with associated pumps and piping for a hydrometallurgical plant on lump sum turnkey basis.

OR

(b) Bidder must have successfully completed at least one package for any pyrometallurgical / hydrocarbon / chemical plant along with associated equipment on lump sum turnkey basis.

In either of the cases (a) & (b) above, Bidder must have successfully designed and fabricated at least one settler or washer or clarifier or tank or sphere of carbon steel make of diameter not less than 12 metre & height 15 metre in the same or in a different package.

The scope of supply and services in either of the above two options should have included design, detail engineering, procurement, fabrication, supply and installation and should have included all civil, structural, mechanical, piping, tanks, electrical, instrumentation, insulation & painting works as a single point responsibility. The above plant should have been commissioned prior to at least one year ending last day of the month previous to the one in which bids are invited.

In case the Bidder meets all other requirements except requisite experience in design & detailed engineering, the subcontracting of design & detailed engineering will be acceptable if the Bidder engages a solitary engineering subcontractor for design & detailed engineering. This solitary engineering subcontractor must meet the qualifying criteria for design & detailed engineering for either (a) or (b) above.

In case of subcontracting of design & detail engineering, Bidder must submit with the bid the proof of the subcontractor meeting the experience criteria, along with an MOU between Bidder and subcontractor defining the scope & responsibility.

(i) The Bidder must have fulfilled the above experience criteria during last Ten (10) years, reckoned from the Bid Due Date.

(ii) The Bidder shall submit following supporting documents for the above mentioned eligibility criteria:

(a) Details of plants meeting the eligibility criteria in the preceding 10 years and the plant should be in operation for at least one (1) year as on the due date of the submission of the Bid.

(b) Work Order or Contract Agreement or Purchase Order and completion certificate(s) issued by Owner(s) and / or end user(s) along with supporting document indicating details of job and the equipment rating.

(c) Technology tie-up/ license/ collaboration agreement, if any.

(iii) Bidder shall furnish Proven Track Record (PTR) in support of their meeting the qualification criteria above along with the bid.

xxx xxx xxx

7.0 Other Points

xxx xxx xxx

7.3 While evaluating the Bidder's conformity with Experience Criteria, the following will be considered :

i) Only such works shall be taken into consideration, the details of which have been submitted by the Bidder in Annexure - 3 for relevant work, along with copy of Purchase Order / Work Order/ Contract Agreement, completion certificate etc. duly authenticated.

ii) Copy of Purchase order / Work Oder/ Contract Agreement/Completion Certificate etc *should establish that the Work was awarded to Bidder, and the Experience Criteria stipulated above has been met with.*

7.4 The failure to meet the BQC stipulated above will render the bid to be rejected.

7.5 Experience of the bidding entity only shall be considered. A job executed by Bidder for its own Plant / Projects, or Projects executed by the Bidder for its Parent / Affiliate / Group company / Subsidiary I Fellow Subsidiary/ Holding company cannot be considered as experience for the purpose of meeting requirement of BQC of the Bidding Document.

xxx xxx xxx

7.11 The Bidder shall in his own interest furnish complete documentary evidence in the first instance itself along with their PQ bids, in support of their fulfilling the Qualification Criteria stipulated above. However, in case of any ambiguity in the documents submitted by the Bidder or if the Bidder submits incomplete documents, pertaining to the BQC, NALCO / tkIS – India may give an opportunity to the Bidder to submit the required documents in support of meeting the stipulated BQC for the jobs mentioned by the Bidder in their original offer, within the time period specified. In case the Bidder fails to submit any document or submits incomplete / ambiguous document within the time period 7 specified, the bid evaluation will be done as per the available documents. The Bidder will not be allowed to submit any new document pertaining to the BQC beyond the bid submission due date.

8. On the basis of the undisputed facts, as narrated above, the only question raised for consideration is as to whether the selection of Opposite Party No.3 as successful Bidder is justified in consonance with the NIT.

Petitioner No.1-Consortium as well as Opposite Party No.3 having been participated in the process of tender and becoming successful in the Technical Bid, participated in the Financial Bid, where the Opposite Party No.3 was declared as L1 and the Petitioner No.1 as L2. At that point of time, a plea was taken by Petitioner No.1-Consortium that by furnishing an experience certificate of a Group Company, Opposite Party No.3 became successful in the tender, which is hit by Clause 7.5 of the NIT. Much reliance was placed on the Completion Certificate dated 06.11.2013 issued by the M/s Himadri Chemicals & Industries Limited, basing upon which Opposite Party No.3 was declared as successful both in the Technical Bid as well as Financial Bid. But it is contended that M/s Himadri Chemicals & Industries Limited is a Group of Company and the Shareholders of the two Companies are blood relations and, as such, the same has been observed in IEM Report, at Page-3, to the following effect:-

> *"However considering the holding by the promoter/promoter group either directly or indirectly*

through other bodies corporates controlled by them, it may be construed that both the companies are Group Companies.”

Having so observed, the IEM in its Report specifically observed as follows:-

> *“As per the statement submitted by Company Secretary of NALCO, as on 30.09.2011, Himadri Specialty Chemical Limited and Tauman Engineering Limited did not have relationship of the type as mentioned under clause 7.5 of the NIT as the shareholding pattern and the Directorship of these two companies were different. Same is the position as on 30.09.2013. Just because some of the shareholders of M/s Tauman Engineering Limited and M/s. Himadri Speciality Chemicals Limited are blood relations (Father-Son), it cannot be concluded that technically they have relationship of the type as mentioned in the clause 7.5 of the tender document unless it meets the requirements as defined in the relevant Act & Rules.”*

9. The contention of Petitioners is that they had raised objection with regard to the experience certificate, but, fact remains, on perusal of the document under Annexure-4 dated 20.12.2021, it is apparent that a request was made by the Petitioners to Opposite Party No.1 to study the material facts and study the documents submitted by the contenders under qualification criteria strictly in the line with NIT clauses. From the above it can

be safely construed that no specific allegation was made with regard to declaring the Bid of Opposite Party No.3 as invalid. Rather, a request was made to make a study of the material facts and on that basis the matter was studied by the IEM, who is an Independent Authority, and it was opined vide Annexure-6 dated 24.02.2022 to the following effect:-

> *" The reason for including clause no. 7.5 of NIT appears to eliminate any doubt on the authenticity of the Experience Certificate submitted by the Bidders, but the accepted principle is that unless the contrary is proved, the notarized document submitted by the parties have to be accepted as authentic.*
>
> *In the light of above discussion, in my considered view, the Experience Certificate submitted by M/s Tauman Engineering Limited, issued by M/s Himadri Speciality Chemical Limited, may be accepted."*

It may be noted that the Petitioners had never disputed the finding of the IEM and only laid emphasis on the observation of the Company Secretary that because of the holding by the Promoter/Promoter Group either directly or indirectly through other Body Corporate controlled by them, it may be construed that both the Companies (Opposite Party No.3 and M/s Himadri Chemicals &

Industries Ltd.) are Group Companies. That by itself will have no consequence, since inquiry was made by an Independent Body, namely, IEM appointed in terms of Clause-6 of the "Pre-Contract Integrity Part", as at Annexure-9, who in turn came to a conclusion, as mentioned above, vide letter dated 24.02.2022. Therefore, this Court is of the considered view that the allegation made by the Petitioners, to the above extent, cannot be sustained in the eye of law.

10. Much argument was advanced with regard to constitution of the Company. As to the definition of 'Group Company', it reads as follows:-

> "*a.* ***"Group Company"*** *means two or more enterprises, which directly or indirectly are in a position to:*
>
> *i. Exercise twenty-six percent or more of voting rights in other enterprise; or*
>
> *ii. Appoint more than fifty percent of members of Board of Directors in the other enterprise."*

Therefore, constitution of Company, if will be taken into consideration, it never exceeds 26% or more of voting rights in other Enterprises and accordingly, the documents which were placed on record under Annexure-8 Series, this Court is not inclined to go into the constitution of Company, as has been placed on record, because the parties are bound by the terms of the NIT and, as such, it is the Tendering Authority, who is the Competent Authority to interpret its clauses. After interpreting the same, whatever results have come out and on that basis, if a decision has been taken by the Authority, this Court does not want to interfere with such decision. But certainly this Court has to examine the decision making process. However, on the basis of the materials available on record, this Court does not find any error apparent on the face of record with regard to the decision making process so as to cause interference by this Court at this stage.

11. In ***M/s. Agmatel India Pvt. Ltd***. (supra), the apex Court, relying on the judgment in ***Bharat Coking Coal Ltd. v. AMR Dev Prabha***, 2020 SCC OnLine SC 335, held as follows:-

> *"15. In the judgment in Bharat Coking Coal Ltd. v. AMR Dev Prabha 2020 SCC OnLine SC 335, under*

the heading "Deference to authority's interpretation", this Court stated:

> *51. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.*
>
> *52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. (Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818)*
>
> *53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality." (emphasis supplied)*

16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India, 2019 SCC OnLine SC 1133, this Court held as follows:

> *"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)."

12. In ***Montecarlo Ltd.*** (supra), the apex Court at Paragraph-24 of the judgment held as follows:-

"24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with

> *which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. <u>But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible</u>. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints. (emphasis supplied).”*

13. In ***Afcons Infrastructure*** (supra), the apex Court at Paragraph-15 of the judgment held as follows:-

> “*15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, <u>unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents</u>*

that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”

14. In view of the principles of law laid down by the apex Court, as discussed above, it is made clear that the apex Court has time and again put restriction with regard to the interpretation given to the conditions of tender document and, as such, it has been held that unless there is mala fide or perversity in the understanding or appreciation or the application of terms and conditions of the tender documents, the constitutional Courts should not interfere with the interpretation given to such tender documents. The apex Court has given a caution with regard to exercise of the power of judicial review and laid down the law stating that exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken by the Tendering Authority, which is manifestly in consonance with the language of the tender document or

subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. More so, the Tendering Authority, who is the author of the tender document, is competent person to interpret the conditions of the tender document and, as such, the Constitutional Court should not interfere with the interpretation given by the Tendering Authority.

15. In view of such position, it is made clear that while interpreting the tender document, the scope of judicial review being very limited in nature, this Court is restrained from interfering with such interpretation, which has been given by the Tendering Authority, as it is in the public interest. Thereby, the prayer made in this Writ Petition cannot be acceded to.

16. The contention raised that the Petitioners' Financial Bid was not open, that itself is belied by the statement made in the Counter Affidavit filed by the Opposite Parties and, as such, the Financial Bid of the Petitioner No.1-Consortium was opened and evaluated with the Financial Bid of Opposite Party No.3. In the

result, Opposite Party No.3 became L1 Bidder whereas Petitioner No.1-Consortium became L2 Bidder. After becoming unsuccessful, Petitioner No.1-Consortium cannot turn around and assail the conditions of Contract stating that the same are arbitrary, unreasonable, contrary to the provisions of law and mala fide.

17. In catena of judgments, it has been held by the apex Court that if a party cannot come out successful, having participated in the process of selection, cannot turn around and challenge the same.

18 In ***Om Prakash Shukla v Akhilesh Kumar Shukla and Others***, AIR 1986 SC 1043, the apex Court held as follows:-

> *"it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

19. In ***Madan Lal v. State of Jammu and Kashmir***, AIR 1995 SC 1088, the apex Court held as follows:-

> *"if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted."*

20. In ***Union of India v. S. Vinodh Kumar***, (2007) 8 SCC 100, in Para-18, it has been held as follows:-

> *"18.........It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein where not entitled to question the same."*

21. In ***Marripati Nagaraja v. Government of A.P.***, (2007) 11 SCC 522, the apex Court observed as follows:-

> *"The other contention of Mr. Rao that the candidates had given only seven days time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission*

> *obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process.*

22. Similar view has also been taken by this Court in ***Pradeep Kumar Jena v. State of Odisha***, 2017 (II) OLR 274; ***Pravati Nayak v. State of Odisha***, 2018 (Supp-II) OLR 946; and also judgment dated 02.04.2019 rendered in W.P.(C) No. 14047 of 2012 (***Keshari Sahoo v. State of Odisha***).

23. Therefore, at the behest of the present Petitioners, the Writ Petition cannot sustain. It is also made clear from the pleadings available on record that the Petitioners have not approached this Court with clean hands, as they have not disclosed that their case was also considered while opening of the Financial Bid and

Petitioner No.1-Consortium was declared as L2 and having not come out successful, they have challenged the same by filing the Present Writ Petition.

24. In ***R. v. Kensington, Income Tax Commissioner***, (1917) 1 KB 486 at page 506, it has been held as follows:

> *"The prerogative writ is not a matter of course; the applicant must come in the manner prescribed and must be perfectly frank and open with the Court."*

25. In ***State of Haryana v. Karnal Distillery***, AIR 1977 SC 781, the apex Court refused to grant relief on the ground that the Applicant has misled the Court.

26. In ***Chancellor v. Bijayananda Kar***, AIR 1994 SC 579, the apex Court held that a Writ Petition is liable to be dismissed on the ground that the Petitioner did not approach the Court with clean hands.

27. In ***Netranananda Mishra v. State of Orissa***, 2018 (II) OLR 436, in which one of us (Dr. Justice B.R.

Sarangi) is a Member, this Court, at Paragraph-26 of the said judgment, held as under:-

> *"………… For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view. ………"*

In view of the above, as the Petitioners have not approached this Court with clean hands, the Writ Petition at their behest cannot sustain in the eye of law.

28. In the result therefore, scrutinizing the materials, both factually and legally, this Court does not find any merit in the Writ Petition, which is accordingly dismissed. No order as to costs.

……………………………

DR. B.R. SARANGI,
JUDGE

S.K. MISHRA, J. I agree.

…………………………

S.K. MISHRA,
JUDGE

Orissa High Court, Cuttack
The 3rd August, 2022, Arun/GDS