

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR
WRIT PETITION NO.2745/2022

Siddhi Vinayak Transport
 Corporation, through it's Partners

1. Shri Satyanarayan S/o Ghasilal Gupta,
Aged about 63 years, Occ.:Business
2. Shri Niket S/o Damodharlal Gupta,
Aged 48 years, Occ : Business,
3. Satish S/o Ghasilal Gupta,
Aged 59 years, Occ.: Business,
4. Ashish S/o Balkisan Gupta,
Aged 41 years, Occ.: Business

All partners are represented through
 Shri Satish S/o Ghasilal Gupta

Address :-85, Ram Nagar, Hill Road,
 Nagpur, Tq. & Dist. Nagpur – 440010 ...**PETITIONERS**

...V E R S U S...

1. Western Coal Fields Ltd.,
Through General Manager (CMC),
Coal Estate, Civil Lines, Nagpur – 440001
e-mail : gmcontracts @westerncoal.gov.in
2. M/s B. Ganga Transport, having its
Office at Shetkari Mandir Road,
near Govt. Hospital Road, Wani,
District Yavatmal

...RESPONDENTS

 Mrs. P.V. Ganediwala with Mr. P.R. Jaiswal, Advocates for
 petitioners.

Mr. S. P. Dharmadhikari, Senior Advocate assisted by Mr. Atul
 Pande, Advocate for respondent no.1.

Mr. M. G. Bhangde, Senior Advocate assisted by Mr. Dhruv
 Sharma, Advocate for respondent no.2.

CORAM:- A. S. CHANDURKAR & ANIL L. PANSARE, JJ.

DATE OF RESERVING THE JUDGMENT :- 24.11.2022

DATE OF PRONOUNCING THE JUDGMENT:- 21.12.2022

J U D G M E N T (Per: Anil L. Pansare, J.)

Rule. Rule is made returnable forthwith. Heard finally by consent of learned counsel for the parties.

2. Respondent Western Coalfields Limited (WCL), on 17.12.2021 floated an e-tender, inviting bids for the work of loading and transportation of coal at Ghonsa OCM of Wani North area. In all 16 bidders submitted their bids. The petitioner firm was one of the bidders. On 13.05.2022, the WCL published tender summary report. The technical bids of eight bidders were rejected on the ground of non fulfillment of the terms and conditions of the NIT. The petitioner was one of them. Aggrieved by rejection of the technical bid, the petitioner is before us, challenging rejection of its technical bid.

3. The question revolves around the eligibility criteria. Clause 6 of the NIT provides for eligibility criteria, which reads thus:

6. Eligibility Criteria

a. Work Experience:

The bidder must have experience of works

(includes completed/ongoing) of similar nature (such as Transportation/Removal of Coal/Overburden/Shale/ Extraneous materials/Sand/etc.) valuing 50% of the annualized estimated value of the work put to tender (for period of completion over 1 year/50% of the estimated value of the work (for completion period up to one year) put to Tender in any (consecutive 365 days) during last 7 (Seven) years ending last day of month previous to the one in which bid applications are invited.”

4. Clause 7 of the NIT deals with the documents to be uploaded by the bidder. The relevant portion of clause 7 is as under:

***7. Scanned copy of documents to be uploaded by bidders (CONFIRMATORY DOCUMENT):
FOR SERVICE TENDERS (Coal Loading and Transportation):***

...Scanned copy of documents, to be uploaded in support of information/declaration furnished online by the bidder against Eligibility Criteria as Confirmatory Document.

For work experience bidders are required to submit Work Experience Certificate issued by the employer against the experience of similar work containing all the information as sought on-line.

Work order, BOQ and, TDS etc. may be sought during clarification or along with deficient documents.”

5. Our attention has been drawn to the other conditions of the NIT as well, which provide that the bids will be in two parts. Part-I/Cover-I and the OID would include, amongst other, the information of the eligibility/qualifying criteria as stipulated in clause nos. 6 and 7 including necessary scanned documents as elaborated therein. The clauses further provide that all the confirmatory documents as enlisted in the NIT furnished by the bidder are to be uploaded in cover-I and OID.

6. Learned counsel for the parties have relied on the following clauses of the NIT; as well:

“12. Technical Evaluation of Tender:

A. After opening of Technical bid, the documents submitted by bidder(s) in cover I as enlisted in the NIT will be downloaded by the Evaluator and shall be put up to the Tender Committee. The Tender Committee will examine the uploaded documents against information/declaration furnished by the bidder(s) online. If it confirms to all of the information/declarations furnished by the bidder online and does not change the eligibility status of the bidder then the bidder will be considered eligible for award of Contract.

B. In case the Tender Committee finds that there is some deficiency in uploaded documents corresponding to the information furnished online or in case

corresponding document have not been uploaded by bidder(s) then the same will be specified online by Evaluator clearly indicating the omissions/ shortcomings in the uploaded documents and indicating start date and end date allowing 7 days (7 x 24 hours) time for online re-submission by bidder(s). The bidder(s) will get this information on their personalized dashboard under “Upload confirmatory document” link. Additionally, information shall also be sent by system generated email and SMS, but it will be the bidder’s responsibility to check the updated status/ information on their personalized dash board regularly after opening of bid. No separate communication will be required in this regard. Non-receipt of e-mail and SMS will not be accepted as a reason of non-submission of documents within prescribed time. The bidder(s) will upload the scanned copy of all those specified documents in support of the information/ declarations furnished by them online within the specified period of 7 days. No further clarification shall be sought from Bidder.

C.

D.

E. In case of bidder(s) submit(s) requisite documents online as per NIT, then the bidder(s) will be considered eligible for opening of Price Bid.

F. Seeking clarification shall be restricted to confirmation of submitted document/online information only and it should be only for one time for

a period of up to 7 days. The clarification shall be taken in online mode in the e-Procurement portal of CIL only.

G. In case bidder(s) fails to confirm the online submitted information(s)/declaration(s) by the submitted documents as (B) above, their/his bid shall be rejected; however, if the conformity documents do not change eligibility status of the bidder in connection his submitted online information(s)/declaration(s), then his/their bid will be accepted for opening of Price Bid.

H. After Technical evaluation of tender, “Technical Evaluation Summary” will be uploaded by the evaluator and price bid shall be opened on preschedule date and time mentioned in the NIT online in the e-procurement portal of CIL. However, in case there is any extension of date and time of price bid opening, it shall be notified online and price bid shall be opened online on e-Procurement portal of CIL at rescheduled date and time.

I.

J.

K.

L.”

“INSTRUCTIONS TO BIDDERS:

22. Examination of Bids and Determination of Responsiveness.

22.1 A substantially responsive Bid is one which

conforms to all the terms, conditions and specifications of Bidding documents without material deviation or reservation. A material deviation or reservation is one:

- a. which affects in any substantial way the scope, quality, or performance of the works;*
- b. which limits in any substantial way, inconsistent with the Bidding documents, the Employer's rights or Bidder's obligations under the Contract; or*
- c. whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive Bids.*

22.2 If a Bid is not substantially responsive, it may be rejected by the Employer as its sole discretion.

23.

24. Award Criteria

*24.1 Subject to Clause 23, the Employer will award the Contract to the Bidder whose Bid has been determined to be substantially responsive to the Bidding documents and who has offered the lowest evaluated **acceptable** Bid Price, provided that such Bidder has been determined to be :*

- a) eligible in accordance with the provisions of NIT;*
- and*
- b) qualified in accordance with the provisions of NIT."*

7. Mrs. Ganediwala, learned counsel for the petitioner, submits that the estimated cost of the work is about Rs.20.90 Crores and the stipulated time for completion of the work is 1155

days i.e. 38 months. The annualized value in terms of clauses 6(a) of the NIT is to be calculated by applying the following formula:

$$\text{Annualized value} = \left\{ \frac{\text{Estimated value/Period of}}{\text{completion in days}} \right\} \times 365$$

8. By applying the aforesaid formula, the annualized value comes to Rs.6.63 Crores (approximately). The work experience as sought under clause 6(a) is 50% of the annualized estimated value which comes to Rs.3.38 Crores (approximately). Thus, the required work experience was of the value of about Rs.3.38 Crores. As against the petitioner has submitted documents to show that it has work experience of about Rs. 9.62 Crores. The petitioner submitted the certificate to that effect issued by the MAHAGENCO (Maharashtra State Power Generation Company Ltd.), a Government undertaking. The petitioner also submitted the document showing payment of bills issued in favour of the petitioners by MAHAGENCO for the period from 04.11.2017 onwards. The only issue was that while making payment the MAHAGENCO did not deduct the tax at source and therefore did not issue the Tax Deducted at Source (TDS) certificate. The respondent WCL has rejected the technical bid on the ground that the TDS certificate has not been submitted by the petitioner though sought for.

9. Mrs. Ganediwala has strenuously argued, by referring to various clauses of the NIT that the submission of TDS was not a mandatory document/condition and having complied with all other criteria, petitioner's technical bid ought to have been accepted. She has emphasized on the wordings of the conditions/ clauses in NIT on the point of the TDS certificate. The NIT provides, under the head of confirmatory document in clause, that the work order, the BOQ and TDS, etc. "may be" sought during the clarification or along with deficient documents for assessment/ valuation of work experience certificate submitted by the bidder. The use of word 'may' in the clause is indicative of the fact that the condition was not mandatory.

10. She further submits that what was mandatory, was the work experience certificate and same having been submitted, the petitioner's bid would become substantially responsive in terms of clause 22.1 of the NIT.

11. Mrs. Ganediwala further submits that the petitioner has also submitted income tax returns in respect of the financial capabilities required under the work experience certificate. The only document that was missing was the TDS certificate, which according to Mrs. Ganediwala, has not been issued by the

MAHAGENCO as the tax was not deducted at source. In that sense, she submits that the lapse, if any, was on the part of the MAHAGENCO. The petitioner could not be blamed for non submission of the TDS certificate, particularly when in response to the communication dated 26.03.2022, issued by the WCL seeking from the petitioner the TDS certificate for financial year 2017-2018, the petitioner had on 28.03.2022 stated that the MAHAGENCO did not deduct the tax at source on the payment made to it and that therefore the same could not be furnished. In the same letter, the petitioner has also submitted copies of the details of monthly summary regarding payments made to it by the MAHAGENCO and the copies of income tax returns and the computation of income of the petitioner firm for the financial year 2017-18, showing fulfillment of the annual value of work experience.

12. It is thus argued that there was sufficient compliance on the point of financial capabilities of the petitioner. As per clause 7 of the NIT, what was required was the work experience certificate. The same having been furnished, supported by other documents, showing that the condition was fulfilled, the bid ought to have been considered eligible for price bid opening. The WCL, in support of the work experience certificate could have sought any document

viz. the work order, the BOQ and TDS, etc. as stipulated in clause 7, meaning thereby that the TDS was not the only document by which the financial capabilities of the bidder could be decided. The petitioner having furnished income tax returns, payment of bills, etc. has therefore fulfilled the eligibility criteria and therefore ought to have been considered the eligible for opening of price bid.

13. Mrs. Ganediwala has then drawn our attention to the pleadings contending that similar such tender was floated by the WCL on 06.12.2021, similar were the clauses under the NIT, similar work experience was sought, similar documents were furnished by the petitioners, in support of work experience. The WCL had accepted the documents and considered the petitioner as eligible for opening of the price bid. She then contends that the WCL has accepted such status when in reply the WCL pleads that even if it is presumed that the claim of the petitioner in respect of the earlier tender is correct, it was an error on the part of the tender committee in qualifying the petitioner for opening the financial bid.

14. Mrs. Ganediwala, has then drawn our attention to the constitution of the tender committee which consists of Ex Officio Members, General Manager (Finance) WCL, General Manager

(CMC), WCL, General Manager (Production), WCL and Area General Manager of the concerned area. The committee is presided over by the Director of the WCL. It is accordingly argued that the tender committee is same in both the cases. Hence, according to her, once the tender committee, in similar set of facts, accepted the tender bid of the petitioner, the petitioner had no reason to take additional efforts to submit any other document and was under the impression that its bid will be considered as eligible. Mrs. Ganediwala further submits that the petitioner has quoted its bid at the rate of 44.75% below as against the rate of 40% below submitted by the L-I. There is difference of Rs.1 Crore and non acceptance of the petitioner's bid would ultimately burden the public exchequer.

15. Mrs. Ganediwala has relied on the following judgments in support of her contention that submission of the TDS certificate was not an essential condition and that on the said ground the WCL could not have rejected the technical bid of the petitioner.

- (i) Khare and Tarkunde Infrastructure Pvt. Ltd. Vs. State of Maharashtra and Ors.¹
- (ii) Poddar Steel Corporation Vs. Ganesh Engineering Works and Ors.²

¹ 2015 (3) Mh.L.J. 668

² (1991) 3 SCC 273

(iii) Joshi Freight Carriers Vs. Central Ware Housing Corporation.¹

(iv) Sagar Lookouts Vs. Maharashtra Housing and Area Development Authority and Ors.²

(v) R. K. Chavan Infrastructure Pvt. Ltd. Vs. State of Maharashtra, through its Secretary PWD and Ors.³

(vi) Reliance Energy Ltd. and anr. Vs. Maharashtra State Road Development Corporation Ltd. and Ors.⁴

(vii) Jai Bholenath Construction Vs. The Chief Executive Officer and Ors.⁵

16. In the case of Khare and Tarkunde Infrastructure Pvt. Ltd. (supra), the bid was rejected on the ground of non submission of copy of the registration of firm. The coordinate bench of this Court, in view of the clauses in the NIT therein, held that the submission of registration certificate was not an essential condition but was collateral one.

17. In the case of Poddar Steel Corporation (supra), requirement case was of depositing earnest money with the tender either in cash or by demand draft drawn on the State Bank of India. The highest bidder had submitted the banker's cheque marked and certified by the Union Bank of India. The employer

1 2017 SCC OnLine Bom 423

2 2022 SCC OnLine Bom 1483

3 2010 SCC OnLine Bom 2263

4 (2007) 8 SCC 1

5 Law Finder Doc Id#2026486

Government (Indian Railways) after verifying the authenticity of the cheque and after receiving the assurance from the bank to honour the same, accepted the banker's cheque. The unsuccessful bidder challenged the acceptance, which went up to the Apex Court. The Apex Court held that the requirement in tender notice can be classified in two categories. The first being essential condition of eligibility and the second being ancillary or subsidiary condition to the main object to be achieved by the condition. The Apex Court held that the essential conditions are required to be enforced rigidly while in other case it is open to the authority to deviate from and not to insist upon the strict literal compliance of the condition. In the said case, the apex Court held that the tender committee took abundant precaution by verifying from the concerned bank of the authenticity of the banker's cheque and that therefore the committee had an authority to waive the technical compliance of the tender condition especially when it was in the interest not to reject the said bid which was the highest.

18. In the case of Joshi Freight Carriers (supra), the coordinate bench of this Court while dealing with the experience criteria, has held in paragraph nos. 15 and 24 thus:

“15. In the light of these arguments, we have perused the records and considered the controversy. Though

petitioner has been found disqualified and experience certificate of M/s. Orient Cement is thrown out of consideration as income earned from M/s. Orient Cement of 2014-15 is not shown in ITR, this application of mind by the tender committee is wrong. Tender has been floatd on 31.05.2016 and documents submitted by petitioner and issued by M/s. Orient Cement was not for the year 2015-16. As per note appearing at page no.4 of the tender document, after qualification conditions, "year" for the purpose of experience is to be taken as financial year, excluding the financial year in which the tender enquiry is floated. Financial year runs from 1st April to 31st March, as stipulated in this note. Thus, the tender enquiry in the present matter is floated the year 2016-17. The said year therefore, gets excluded. Petitioner therefore, could have shown its competency and experience with reference to five financial year counted backwards i.e., prior to 31.3.2016. The documents looked into by the Tender Committee are for the financial year 2014-15. Tender Committee takes note of the fact that Orient Cement Limited has given experience certificate of Rs. 1205.69 lakhs for the financial year 2014-15. Thereafter the Tender Committee notes that income tax return reveals TDS deduction by Orient Cement only for work done worth Rs. 18.37 Lakhs and not for whole figure certified therein. Hence this certificate has been disbelieved. Reasons recorded by the Tender Committee are reproduced below for ready reference.

"Experience criteria not met as experience certificate of M/s. Oriental Cement is not taken into consideration since income of M/s. Oriental Cement of 2014-15 is not shown in ITR.

Technically disqualified."

16 to 23.

24. However, as we find that the certificate issued by IFFCO has not been discarded by recording any reasons and also, has not been independently looked into to consider the eligibility of petitioner in terms of paragraph no.4[A] [a]. Similarly, the certificate issued by M/s. Orient Cement has been eliminated from consideration on erroneous ground. Hence, we are not in a position to sustain the consideration by the tender committee. Any responsible body entrusted with such a vital duty would not have committed such an error by failing to evaluate the documents on record or by not applying the correct legal provisions. The other bidders have pointed out some additional material alleging it to be adequate to disqualify the petitioner. Thus applying the yardsticks mentioned supra in the judgment of the Hon'ble Apex Court, the present exercise and consideration by the tender committee definitely calls for intervention by this Court. That exercise and the order disqualifying the petitioner is unsustainable. Respondent no.2 has pointed out to this court additional material i.e. letter dated 28.01.2016 sent by the Vice President, Human Resources of Orient Cement Ltd., to Maharashtra State Warehousing Corporation. This communication also

needs due verification and its impact on the offer of petitioner deserves to be considered by respondent no.1 through its tender committee.”

19. In the case of Sagar Lookouts (supra), our attention has been drawn to paragraph nos. 36 on the point of work experience.

Paragraph 36 thereof reads thus:

“36. The argument of Dr. Milind Sathe and Mr. Ram Apte that considering the experience of the partner of Sagar Lookouts in Urja would tantamount to a bid being submitted by a consortium does not also commend to us. We have to bear in mind that the tender condition required the bidder to have an experience of erecting and handling 50 hoardings each of minimum 450 sq.ft. in corporation/Authority area. From the stand point of MHADB, the credentials of the person who is entrusted with the performance of work viz. the background of the firm and the persons who are in control of the same and their capacity to execute the work has to be seen. The tendering authority will not go by the name of the firm but the person/s behind it. We have no hesitation in concluding that the Committee completely erred in discarding/ignoring the documents relating to the experience of the partner of the bidder firm. It is not disputed that the bid of the petitioner is held ineligible only on the ground that it does not have the experience of erecting and handling 50 hoardings and on no other ground.”

20. In the case of R. K. Chavan Infrastructure Pvt. Ltd., (supra) our attention was drawn to paragraph 74 on the point of requirement of experience certificate. Paragraph 74 reads thus:

“74. It is needless to mention that the purpose and requirement of an experience certificate, is to ascertain the capacity and capability of a tenderer to perform the work intended to be done, and any document demonstrating this position, would comply with the requirement of an experience certificate, unless the terms of the NIT specified that an experience certificate in a particular form/format alone would be acceptable to comply with the qualifying criteria, which is not so in the instant matter. As stated above the substance and not the form is material.”

21. The judgment in the case of Reliance Energy Ltd. and anr. (supra), has been taken aid of by the petitioner to contend that when tenders are invited, the terms and conditions must indicate with legal certainty the norms and benchmarks with clarity so as to ensure legal certainty and necessity to satisfy the test of “reasonableness.” It is further held that if there is vagueness or subjectivity in the norms specified, it may result in unequal and discriminatory treatment and violate the doctrine of “level playing field.”

22. As against this, Mr. S. P. Dharmadhikari, learned Senior Counsel for the respondent no.1-WCL, contended that the tender document will have to be read as a whole for proper interpretation of the clauses. He contends, by referring to clauses 6 and 7 of the NIT that the requirement of the TDS certificate, which the petitioner has argued to be of ancillary nature, has been stipulated under the head of “Confirmatory Document”. He contends that the TDS certificate may be sought during clarification or along with deficit documents but the moment document is sought, it would fall under the category of “Confirmatory Document” and that non compliance of the said clause would render the bid of the petitioner and similarly placed persons as non responsive. Mr.Dharmadhikari further submits, upon instructions, that the TDS certificate was sought from all the 16 bidders and that except the petitioner, the other 15 bidders have submitted the TDS certificate.

23. Mr. Dharmadhikari further contends that one of the bidders M/s.Khandelwal Earth Movers, who worked for MAHAGENCO had submitted TDS certificate and that therefore there was no reason for the WCL not to expect the petitioner to

furnish the TDS certificate. At this stage, Mrs. Ganediwala, countered by arguing that the MAHAGENCO probably started issuing the TDS certificates from the year 2020 onwards and that the TDS certificate submitted by M/s. Khandelwal Earth Movers appears to be of the year 2020. Mr. Dharmadhikari, responded by submitting that, that may be the petitioner's view but how would WCL know of such a status. In the circumstances, according to Mr. Dharmadhikari, the least the petitioner could have done is to furnish letter issued by the MAHAGENCO mentioning that the tax has not been deducted at source and therefore the TDS certificate is not issued.

24. Mr. Dharmadhikari further submits that, unless otherwise is shown, the presumption will be that the MAHAGENCO, a Government undertaking, shall deduct the tax at source. The WCL, accordingly expected the petitioners to present the TDS. The petitioner did not but all others did. Therefore, the WCL has rightly rejected the technical bid of the petitioner.

25. Mr. Dharmadhikari has then submitted that the petitioner has not attributed mala fides or personal bias against the WCL. Further, there is no reason why the WCL will act malafidely or arbitrarily in such matters.

26. On the point of difference of Rs.1 Crore in the bids allegedly submitted by petitioner and the L-I, Mr.Dharmadhikari submits that for employers like the WCL or any other employer when the work experience and the capabilities of the bidders are to be tested, the prime consideration is that the proposed work should be completed in time and for that purpose, in a given case, the employer may even ignore the lowest bid.

27. Mr. Dharmadhikari further submits that the petitioner has interpreted the clauses from its point of view. The position of law on the point of interpretation of tender document is well settled and that the Apex Court in various rulings has held that the authority which floats the contract or tender and has authored the tender document is the best judge to interpret the tender clauses/conditions. The Apex Court has further ruled that if two interpretations are possible then the interpretation that suits the employer must be accepted and that the courts would only interfere to prevent the arbitrariness, illegality, bias, mala fides or perversity. In the present case, the petitioner having not even pleaded mala fides, arbitrariness, etc. the interpretation of the WCL that once the TDS certificate is sought, it becomes a confirmatory document.

28. Mr. Dharmadhikari further submits that the tender committee which conducts technical evaluation of the bids consists of different officials for different regions. The tender dated 06.12.2021, which the petitioner cited was for Wani North area and the tender in the present case is for Ghonsa OCM of Wani north area and that therefore a different committee has assessed and evaluated technical bids.

29. The WCL has relied upon the following judgments:

- (i) Silppi Constructions Contractors Vs. Union of India and anr.¹
- (ii) Agmatel India Pvt. Ltd. Vs. Resoursys Telecom and Ors.²
- (iii) N.G.Projects Ltd. Vs. Vinod Kumar Jain and Ors.³
- (iv) Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and anr.⁴

30. In Silppi Constructions Contractors (supra), the Apex Court, while dealing with the question of interpretation of tender document and the scope of judicial review and interference therein has summarized as under:

“Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. Courts must realise

1 (2020) 16 SCC 489

2 (2022) 5 SCC 362

3 (2022) 6 SCC 127

4 AIR 2016 SC 4305

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 Judges do not have the necessary expertise to adjudicate upon technical issues beyond their domain. Courts should give way to the opinion of experts unless the decision is totally arbitrary or unreasonable. Courts should not use a magnifying glass while scanning tenders and make every small mistake appear like a big blunder. Courts must give “fair play in the joints” to 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. Court does not sit like a court of appeal over the appropriate authority. 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. 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. Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.”

31. In the case of Agmatel India Pvt. Ltd. (supra), the Supreme Court held that if the interpretation of the tender document by author is manifestly in consonance with the language

of the tender document or subserving the purpose of the tender, the Court would prefer to keep restraint. It is further held that the technical evaluation or comparison by the Court is impermissible and that 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, so long as such an interpretation is not arbitrary or whimsical.

32. In the case of N. G. Projects Ltd. (supra), the judgment which is relied upon by the respondent no.2 as well, various judgments of the Apex Court were considered, which we will deal with a little later. The relevant findings, amongst others, is that the satisfaction on whether a bidder satisfies the tender condition is primarily of the authority inviting bids since the authority is aware of expectations from the tenderer while evaluating the consequences of non performance. The Apex Court further held that on the same set of facts the different conclusions can be arrived at in bona fide manner the by technical valuation Committee.

33. In the case of Afcons Infrastructure Ltd. (supra), the Apex Court held that where employer has disqualified a bidder at

a technical bid opening the interference by the constitutional Court in the decision making process or a decision taken by employer is permissible only when the mala fide intention to favour someone or arbitrariness or illegality or perversity was shown.

34. Mr. M. G. Bhangde, learned Senior Counsel for respondent no.2, the successful bidder, has supported the stand taken by the WCL on the point of interpretation of the tender condition that the TDS certificate once sought, would fall in the category of confirmatory document. He further submits that the petitioner has not challenged the condition requiring bidders to furnish TDS certificate and therefore the case of the petitioner to read exception in submitting TDS certificate is impermissible.

35. Mr. Bhangde then argued by referring to clause nos.22.1 and 24.1 that the WCL is duty bound to award the contract to the bidder whose bid is determined to be substantially responsive and who has offered the lowest evaluated acceptable bid price provided that such bidder has been determined to be eligible in accordance with the provisions of the NIT. Thus, according to him, unless and until the bidder becomes eligible in accordance with the provisions of the NIT, the bid cannot be said to be substantially responsive. This argument is in response to the

case of the petitioner, that the substantially responsive bid is the one which confirms all the terms, conditions and specifications of the bidding documents without material deviation or reservation.

36. Mr. Bhangde further submits that the petitioner cannot argue that the earlier employer i.e. MAHAGENCO has not issued the TDS certificate because the condition of tender makes it mandatory to produce the TDS certificate. In other words, it is argued that absence of the TDS certificate cannot be explained and/or accepted.

37. Mr. Bhangde, has then referred to the contract manual of the WCL wherein chapter 3 deals with Transport Contracts. It provides under the head “Supporting documents to be uploaded online”, that documents like contract, BOQ, TDS, etc. may be sought during clarification or along with deficient documents. Accordingly, he argued that the tender document is in conformity with the contract manual and therefore tender document and the decision making process cannot be faulted with.

38. Mr. Bhangde, by referring to clause 12 (E) of the tender document, submits that the bidder will be considered eligible for opening the price bid only when he submits the requisite documents online as per the NIT. The petitioner having failed to

submit the TDS certificate, has been rightly rendered disqualified. At this stage, Mrs. Ganediwala, has immediately referred to sub clauses (F) and (G) to contend that there is a provision to seek clarification and once the clarification is given, the bid would become substantially responsive. Mr. Bhangde, in response, submitted that the clarification has to be in tune with the clauses of the NIT and a mere statement that the tax has not been deducted by the MAHAGENCO will not substitute the requirement of submitting the TDS certificate.

39. According to Mr. Bhangde, the petitioner has failed to satisfy the requirement of experience in terms of the NIT and that therefore respondent no.1 has rightly disqualified the petitioner in technical bid. In support of his contention, Mr. Bhangde has relied upon the following decisions:

- (i) Sorath Builders Vs. Shreejirupa Buildcon Limited and another¹
- (ii) N. G. Projects Ltd. Vs. Vinod Kumar Jain and Ors.²
- (iii) National High Speed Rail Corporation Ltd. Vs. Montecarlo Ltd. and anr.³
- (iv) Union of India & Ors. Vs. Bharat Forge Ltd. & anr.⁴

1 (2009) 11 SCC 9

2 (2022) 6 SCC 127

3 (2022) 6 SCC 401

4 2022 (12) SCALE 122

40. In the case of Sorath Builders (*supra*), the Apex Court while dealing with the binding effect of the tender conditions, held that the rejection of the bid due to failure to satisfy the requirement of experience is justified. Our attention has been drawn to paragraph 26, which reads thus:

26. In W.B.State Electricity Board Vs.Patel Engineering Co.Ltd. and Others, reported in (2001) 2 SCC 451, this Court while considering the issue with regard to the process of tender (SCC p.467, para 24)

"24.where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values".

It was also held:

"24.the very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty". It was further held: (SC p. 471 para 31)

"31.the contract is awarded, normally, to the lowest tenderer which is in public interest and that it is equally in public interest to adhere to the rules and conditions subject to which bids are invited".

41. In the case of N. G. Projects Ltd. (supra), as stated earlier, the Apex Court has considered various judgments, some of which, according to Mr. Bhangde, are relevant to decide the question involved in the present case. The Apex Court considered various judgments in paragraph nos. 11, 12 and 13, which read thus:

“11. Learned counsel for the appellant also referred to a judgment reported as Central Coalfields Limited & Anr v. SLL-SML (Joint Venture Consortium) & Ors. wherein it was held that it was not for the Court to substitute its opinion in respect of acceptance of bank guarantee. It was held that when a particular format for a bank guarantee is prescribed, then the bidder is required to stick to that particular format alone with the caveat that the State reserves the right to deviate from the terms of the bid document within the acceptable parameters. This Court held as under:

“32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

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37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in Jagdish Mandal followed in Michigan Rubber.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could

lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that “Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive”. Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.”

12. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited, this Court held 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. It was held as under:

“13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

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, unless there is mala fide or

perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

13. This Court sounded a word of caution in another judgment reported as Silppi Constructions V. Union of India, wherein it was held that the Courts must realize 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. Courts must also not interfere where such interference would cause unnecessary loss to the public exchequer...”

42. In the case of National High Speed Rail Corporation Ltd. (supra), our attention has been drawn to paragraph nos. 38 and 42 on the point of manner in which the terms of tender should

be read. Paragraph no. 38 and 42 thereof read thus:

“38. the High Court ought to have appreciated that the Bullet Train Project is a result of long-drawn deliberations between the Government of India on the one hand and the Government of Japan on the other. That thereafter a loan agreement came to be executed between the Japan International Cooperation Agency (JICA) and Hon’ble the President of India and the JICA agreed to fund approximately Rs.1 lakh crores for the project on the terms and conditions mentioned in the loan agreement and the other agreed terms including the terms and conditions of the Bid document shall be finalized by the JICA/JICC. The Bidding Documents are based on JICA’s Standard Bidding Documents as well as based on JICA’s procurement guidelines, which form an integral part of the loan agreement. Therefore, any decision contrary to the terms and conditions of the Bidding Document would be altering the terms and conditions of the loan agreement, which would not be permissible. JICA has a vital role to play in such contracts.

39 to 41. ...

42. Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 of ITB were well within the knowledge of the original writ petitioner at the time of participating in the tender process. The aforesaid clauses of the ITB were put to the knowledge of all the participants/bidders and the same applied to all.

Despite the above clauses in the ITB, original writ petitioner participated in the tender process. Therefore, once having accepted the terms and conditions of the tender process with the full knowledge of Clauses 28.1 and 42.5, and participated with full knowledge, thereafter, it was not open for the original writ petitioner to make a grievance with respect to such clauses. 14.1 Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 are part of the instructions to the Bidders (ITB) and, therefore, part of the Bidding Document. At this stage, it is required to be noted that loan agreement was materialized after a detailed Memorandum of Understanding and the loan agreement between the two Prime Ministers and how the project would be financed and operated. That thereafter followed by general consultancy of the project discussion, it was culminated into a loan agreement with the specific condition that the terms of the contract and the Bid document shall be finalised and prepared by JICC and approved by JICA. It appears that the contents of the Bidding Document are based on JICA' Standard Bidding Documents as well as JICA's procurement guidelines and form an integral part of the loan agreement. It is to be noted that such foreign funded investments in the form of concessional Official Development Assistance (ODA) loan by JICA are made on the basis of non-negotiated terms and conditions, where the sole discretion as to what will be the terms

and conditions of the tender and on what terms and conditions the project would be financed, vests with the investor foreign developed nation. Therefore, the impugned judgment and order passed by the High Court on Clauses 28.1 and 42.5 would be altering the terms and conditions of the Bid Document / ITB, which as such were finalized and approved by the JICC/JICA and which were provided as per the JICA's international guidelines and which as such were to be complied with by all the bidders/participants."

43. In the case of Union of India & Ors. Vs. Bharat Forge Ltd. & anr. (supra), our attention has been drawn to paragraph nos. 39 and 43, which read thus:

"39. The terms of the bid cannot be said to be afflicted with the vice of legal uncertainty. This is not a case where the principle as enunciated in Reliance Energy (supra) would be apposite. It is elementary that principles enunciated in the facts of a case are not be likened to Euclid's Theorem, having an inexorable operation divorced from the facts which arise for consideration. In this case, the interplay of the three Clauses, which we have referred to, and its conjoint operation, could not have left the bidders or the purchasers (appellants) in any uncertainty.

40 to 42 ...

43. *The argument of the writ petitioner, which has found favour with the High Court and reiterated*

*before us by Shri Amar Dave, learned Counsel for the writ petitioner is that since the tender conditions contemplate the adding of the tax to the base price for the purpose of arriving at the ranking, which, in turn, will determine, as to who will be the successful bidder, there is the unfair trade practice indulged in by some of the bidders to understate the rate of tax. There is an eminent need for the State (appellants) to indicate the HSN Code. Once it is indicated, it becomes a panacea, as it were, to the evil, which has been perceived and successfully pressed by the writ petitioner. Is that so? The answer to this question, has both legal and factual dimensions. As far as the legal aspects are concerned, the fundamental question, we must pose is, whether there exists any public duty with the appellants to indicate the HSN Code when they float a public tender. Here the learned ASG is correct, when he points out that there is no statutory duty cast on the appellants to indicate the HSN Code in a tender of the kind we are concerned with. Proceeding on the basis that a public duty may emerge, not merely from a Statute but in various other ways, which has been touched upon, in *Andi Mukta (supra)* as also, in *Mansukh Lal (supra)* and even on an expansive exploration, does such a duty flow from any other legitimate source?*

44. Mr. Bhangde, taking aid of these judgments, supports the stand taken by the WCL and prays for dismissal of the petition.

45. We have given our anxious consideration to the submissions made by both the sides. We have gone through the material placed before us including the tender document in the light of judgments relied upon by both the sides.

46. The main question before us is whether the submission of the TDS certificate was mandatory, once sought by the respondent WCL?

47. We appreciate the manner in which Mrs. Ganediwala, learned counsel for the petitioners, has presented the case. The primary requirement under Clauses 6 and 7 is to submit 'work experience certificate'. These clauses further provide that the work order, BOQ, TDS Certificate, etc. may be sought during clarification with deficit documents. The petitioner, therefore, is correct in contending that the genesis of the document is the work experience certificate.

48. The petitioner believes that the TDS certificate may or may not be sought during clarification and therefore is not a mandatory document. The petitioner has a reason to believe so. The reason being, in similar set of facts, in the earlier tender dated 06.12.2021, when the WCL sought TDS certificate, the petitioner has tendered an explanation that MAHAGENCO had not deducted

the tax on the payments made to it and therefore the TDS certificate was not issued and that the petitioner enclosed summary of payments so also income tax return to show its financial ability which was accepted by the WCL. The petitioner, therefore had every reason to presume that its explanation will be accepted in the present tender as well and that it has sufficiently complied with the eligibility criteria and therefore its tender is responsive.

49. This, however, is the petitioner's perspective. The respondents have a different version. Their arguments have already been noted. According to the respondents, though the work experience certificate is of prime importance, the requirement to submit work order, BOQ, TDS certificate, etc. once sought during the clarification would become equally important as the provisions requiring both, work experience certificate and TDS certificate, is stipulated under the category of "Confirmatory Document".

50. On the point of acceptance of explanation of the petitioner in the earlier tender, the respondents' answer is that the mistake committed, if any, will not give any right to the petitioner to claim similar such relief and that mistake can always be

corrected. It is further the case of the respondents that the tender committee consist of different officials for different regions and therefore the acceptance of explanation by one committee is not binding on another committee. It is for the employer to interpret the tender document. Thus, in the present case, the TDS certificate was found to be a mandatory document and therefore technical bid has been rightly rejected.

51. Thus, there are two views or angles. One is of the petitioner and another is of the respondents. We are inclined to accept the view of the respondents for the reasons to follow.

52. Admittedly, the work experience certificate issued by the employer against the experience of similar work is an important document. The work experience certificate issued in favour of the petitioner would show that the petitioner has executed similar such works and that the value of the execution is to the tune of Rs.9.60 Crores approximately, which is more than the work experience required under clause 6 of the tender document.

53. The WCL thought it proper, for whatsoever reason, to seek TDS certificate for the financial year 2017-18. It was within the discretion of the WCL. Once such clarification is sought, the

only interpretation that is possible, if clauses 6 and 7 are read carefully, is that submitting TDS certificate is mandatory being a confirmatory document. Ultimately, TDS certificate is a document that would substantiate the claim made by the persons like the petitioner on completing the value of the work as shown in the experience certificate. There cannot be any dispute that the deduction of tax at source is a mandatory requirement under the Income Tax Act and that failure to deduct the tax leads to the penal consequence and that therefore the WCL has every reason to believe that in absence of TDS certificate the petitioner's claim of completing the valued work shown in the experience certificate is doubtful.

54. The WCL had one more reason to expect the TDS certificate from the petitioner as the work experience certificate was issued by the MAHAGENCO, a Government undertaking and that therefore there will be presumption that the provisions of Income Tax Act have been duly complied with, which includes the tax deduction at source. The WCL has furthermore a reason to expect the TDS certificate from the petitioner. The reason being the other tenderer M/s. Khandelwal Earthmovers Ltd., who worked for MAHAGENCO has submitted the TDS certificate. The

argument of petitioner that MAHAGENCO has started issuing TDS certificates subsequently and that the tax was not deducted during the financial year 2017-18, though correct from its perspective, would be insignificant from the perspective of the WCL inasmuch as it is not even the case of the petitioner that the WCL is in know of the said fact. The WCL, therefore, cannot be blamed on this point.

55. Further, there is nothing on record to show that the tender committee which accepted the explanation of the petitioner on the earlier occasion is the same which has turned down the explanation in the present case. Mr. Dharmadhikari, learned Senior Counsel for the WCL has categorically stated that the officials in the tender committees for the different regions are different. It is further not the case of the petitioner that the WCL is aware that MAHAGENCO has started issuing TDS certificate subsequent to the year 2017-18 and that MAHAGENCO has not deducted tax at source for the financial year 2017-18. The WCL therefore was fully justified in examining the bids in the light of the tender clauses. The clauses in the tender document, particularly qualifying clauses, are incorporated by the employer to get the suitable bidder for the proposed work. In that sense there

is a purpose behind such clauses. This appears us to be one of the reasons why the Apex Court has ruled that the employer is the best person to interpret the clauses of tender document.

56. Mr. Dharmadhikari has therefore correctly pointed out that the least that the petitioner could have done is to submit a document from MAHAGENCO to that effect. We also find substance in the stand taken by the WCL that in similar set of facts, two different committees may take different views depending on the requirements and that such stand is supported by the judgment of the Hon'ble Apex Court in the case of N. G. Projects Ltd. (supra).

57. Mr. Bhangde, learned Senior Counsel for respondent no.2 has brought to our notice that the petitioner has not challenged the condition seeking TDS certificate in the clarification. The bid of the petitioner, therefore, cannot be said to be substantially responsive in terms of clauses 21.1 because for substantially responsive bid, the bidder has to be eligible in accordance with the provisions of NIT. The requirement of submitting TDS certificate cannot be substituted by the statement that the earlier employer viz. MAHAGENCO has not deducted the tax at source.

58. The other clauses which have been relied upon by the petitioner would also indicate that only when the requisite documents are uploaded online as per the NIT, the bidder will be considered eligible for opening of the price bid. The requisite document would mean the documents sought by the WCL in clarification as well.

59. The petitioner made an attempt to substantiate its case by relying upon the judgments referred to in the earlier paragraphs. We have gone through the said judgments. The reliefs granted therein were in the peculiar facts and the tender clauses therein. In essence, the principle of law laid down in the said judgments is that the requirements in the tender can be classified in two categories viz. essential condition of eligibility and ancillary or subsidiary condition of eligibility. Accordingly, it is held in the judgments, in context with the tender conditions in respective cases that where essential condition has not been complied with and employer has accepted the bid, the Court would interfere in the matter. The Court may also interfere in the matter where the employer has not considered the documents furnished by the bidders in accordance with the prescribed eligibility criteria.

60. In the present case, however, the petitioner failed to show that the WCL has not considered the documents submitted by the petitioners in accordance with the tender conditions or that WCL exceeded its authority in evaluating the petitioner's documents. The petitioner's case is based on interpretation of clauses 6 and 7 of the tender conditions, that the requirement to furnish documents viz. work order, BOQ and TDS, etc., if sought by the WCL, is not a mandatory condition; which we found to be not sustainable. In other words, the said condition was found to be mandatory and therefore non compliance of the said condition would render the bid to be not responsive. We have not noticed in the judgments cited by the petitioner any clause of a nature similar to clauses 6 and 7, where the Court has interpreted the clause as suggested by the present petitioner. Therefore, the judgments relied upon by the petitioner will not be of any help in this case.

61. The law in tender jurisdiction, in last decade or so, has seen a significant change. The judgments relied upon by the respondents would indicate that unless mala fides, arbitrariness, perversity, intention to favour someone, etc. in the decision making process has been pleaded and shown by the persons like the petitioner, the interpretation of the clauses chosen by the

employer or the decision of the employer to award contract to a particular agency, cannot be faulted with. It is so because the authority floating the tender is the best judge of its requirements and as to how the documents have to be interpreted.

62. The tender under question is in respect of loading and transportation of coal at Ghonsa OCM of Wani north area. The cost of the tender is about 20 Crores. The time for completion of tender is of utmost importance. Therefore the condition of work experience under the eligibility criteria attains a significant importance. Failure to complete the work not only affects the future course of action but also affects the cost of the work because of escalation in prices. In that sense difference of Rs.1 Crore or so in the bid quoted by the petitioner and the lowest bidder would be insignificant; if it is found that the petitioner does not possess the requisite experience to handle the work.

63. It is, thus, for the employer to decide as to who will be the best suited agency for taking up its work. The clauses of the tender are interpreted accordingly. In the present case, the WCL was of the view that the submission of TDS certificate once sought would be mandatory for the bidder. Such an interpretation must be respected in the light of the law laid down by the Hon'ble Supreme Court.

64. We are, therefore, not inclined to exercise jurisdiction under Article 226 of the Constitution of India. The petition is dismissed accordingly.

Rule is discharged. No order as to costs.

(Anil L. Pansare, J.)

(A. S. Chandurkar, J.)

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