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W.P.Nos.5965 of 2020, 5970 of 2020,
31065 of 2019 and 31068 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.12.2022

Pronounced on : **13.12.2022**

CORAM:

THE HON'BLE MR. JUSTICE **R.SURESH KUMAR**

**W.P.Nos.5965 of 2020, 5970 of 2020,
31065 of 2019 and 31068 of 2019
and W.M.P.Nos.7001, 7004, 7010 and 7011 of 2020
and W.M.P.Nos.31179 and 31186 of 2019**

W.P.No.5965 of 2020

RT ETI Environtech Private Limited
Represented by its Authorised Signatory,
Block C-118, Swagat Rain Forest 2,
Opp. Swaminarayan Dham,
Koba-Gandhinagar Highway,
Kudasan, Gandhinagar,
Gujarat.

... Petitioner

Vs.

1. The Government of Tamil Nadu
Highways and Minor Ports Department,
Secretariat,
Chennai - 600 009
Rep. by its Principal Secretary
2. The Superintending Engineer (H)
C&M, Coimbatore,
Door No.1653, Highways Compound,
Trichy Road, Coimbatore - 641 018.



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3. The Divisional Engineer (H)
C&M, Udhaigai,
Udhaigai.

4. Hariway Lines Pvt., Ltd.,
No.14/09, Flat No.102, Bahkthavatchalam Nagar,
4th Street, Adyar,
Chennai - 600 020.

... Respondents

Prayer : Writ Petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to TRP No.59/2019/DO-1/Dt. 29.01.2020 for award of tender by the second respondent to the fourth respondent, for providing Safety Roller Barrier with Ethylene Vinyl Acetate (EVA) Rollers at Km 6/6, 7/10, 8/6, 8/10 of Thalaikundha Kallatty Theppakkadu Road (MDR 700) in pursuant to the Tender Notice No.11/2019-20/HDO/Dated 04.10.2019 for a value of Rs.87,16,788/- ("Tender-I") and quash the same and direct the Respondent No.2 to re-tender the contract for Providing Safety Roller Barrier with Ethylene Vinyl Acetate (EVA) Rollers at Km 6/6, 7/10, 8/6, 8/10 of Thalaikundha Kallatty Theppakkadu Road (MDR 700) in accordance with the Tamil Nadu Tender Transparency Act, 1998 and the Rules made thereunder in a fair and transparent manner after prescribing neutral technical specifications.

W.P.No.5970 of 2020

RT ETI Environtech Private Limited
Represented by its Authorised Signatory,
Block C-118, Swagat Rain Forest 2,



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Opp. Swaminarayan Dham,
Koba-Gandhinagar Highway,
Kudasan, Gandhinagar,
Gujarat.

... Petitioner

Vs.

1. The Government of Tamil Nadu
Highways and Minor Ports Department,
Secretariat,
Chennai - 600 009
Rep. by its Principal Secretary

2. The Superintending Engineer (H)
C&M, Coimbatore,
Door No.1653, Highways Compound,
Trichy Road, Coimbatore - 641 018.

3. The Divisional Engineer (H)
C&M, Udhagai,
Udhagai.

4. Hariway Lines Pvt., Ltd.,
No.14/09, Flat No.102, Bahkthavatchalam Nagar,
4th Street, Adyar,
Chennai - 600 020.

... Respondents

Prayer : Writ Petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to TRP No.60/2019/DO-1/Dt. 29.01.2020 for award of tender by the second respondent to the fourth respondent, for providing Safety Roller Barrier with Ethylene Vinyl Acetate (EVA) Rollers at Km 9/10, 10/2, 10/10(i), (ii) of Thalaikundha Kallatty Theppakkadu Road



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(MDR 700) in pursuant to the Tender Notice No.12/2019-20/HDO/Dated 09.10.2019 for a value of Rs.87,16,788/- ("Tender-II") and quash the same and direct the Respondent No.2 to re-tender the contract for Providing Safety Roller Barrier with Ethylene Vinyl Acetate (EVA) Rollers at Km 9/10, 10/2, 10/10(i), (ii) of Thalaikundha Kallatty Theppakkadu Road (MDR 700) in accordance with the Tamil Nadu Tender Transparency Act, 1998 and the Rules made thereunder in a fair and transparent manner after prescribing neutral technical specifications.

W.P.No.31065 of 2019

RT ETI Environtech Private Limited
Represented by its Authorised Signatory,
Block C-118, Swagat Rain Forest 2,
Opp. Swaminarayan Dham,
Koba-Gandhinagar Highway,
Kudasan, Gandhinagar,
Gujarat.

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Vs.

1. The Government of Tamil Nadu
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Secretariat,
Chennai - 600 009
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2. The Superintending Engineer (H)
C&M, Coimbatore,
Door No.1653, Highways Compound,
Trichy Road, Coimbatore - 641 018.



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3. The Divisional Engineer (H)
C&M, Udthagai,
Udthagai.

... Respondents

Prayer : Writ Petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to Tender Notice No.11/2019-20/HDO/Dated 04.10.2019 issued by the second respondent and quash the same and direct the second respondent to re-tender the contract for providing Safety Rolling Barrier at Km 6/6, 7/10, 8/6, 8/10 of Thalaikundha Kallatty Theppakkadu Road (MDR 700) in accordance with the Tamil Nadu Tender Transparency Act, 1998 and the Rules made thereunder after prescribing neutral technical specifications or in the alternative only MASH TL-4 certification and Indian Road Congress accreditation based technical specifications.

W.P.No.31068 of 2019

RT ETI Environtech Private Limited
Represented by its Authorised Signatory,
Block C-118, Swagat Rain Forest 2,
Opp. Swaminarayan Dham,
Koba-Gandhinagar Highway,
Kudasan, Gandhinagar,
Gujarat.

... Petitioner

Vs.

1. The Government of Tamil Nadu
Highways and Minor Ports Department,
Secretariat,
Chennai - 600 009
Rep. by its Principal Secretary



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2. The Superintending Engineer (H)
C&M, Coimbatore,
Door No.1653, Highways Compound,
Trichy Road, Coimbatore - 641 018.

3. The Divisional Engineer (H)
C&M, Udhagai,
Udhagai.

... Respondents

Prayer : Writ Petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to Tender Notice No.12/2019-20/HDO/Dated 09.10.2019 issued by the second respondent and quash the same and direct the second respondent to re-tender the contract for providing Safety Rolling Barrier with Ethylene Vinyl Acetate (EVA) Rollers at Km 9/10, 10/2, 10/10 (i), (ii) of Thalaikundha Kallatty Theppakkadu Road (MDR 700) in accordance with the Tamil Nadu Transparency Act, 1998 and the Rules made thereunder after prescribing neutral technical specifications or in the alternative only MASH TL-4 certification and Indian Road Congress accreditation based technical specifications.

For Petitioners : Mr.Sathish Parasaran, Senior counsel
for Mr.Karthik Sundaram
in all the writ petitions

For Respondents : Mr.J.Ravindran
Additional Advocate General
assisted by
Mr.B.Vijay, AGP for R1 to R3
in all the writ petitions



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Mr.A.L.Somayaji, Senior counsel
for Mr.V.Perumal for R4
in W.P.Nos.5965 and 5970 of 2020

COMMON ORDER

Since the issue raised in all these writ petitions is one and the same or inter related, with the consent of the learned counsel appearing for the parties, these writ petitions were heard together and were disposed of by this common order.

2. The petitioner company according to them is engaged inter alia in the business of manufacturing and supplying of several state of the art road safety equipments, such as vehicle protection fence and the Roller Barrier System, which is otherwise called as Safety Roller Barrier in short “SRB”.

3. These devices are patented by ETI Ltd., Korea and the petitioner claims that, he has got exclusive right to sell at market the same in India. The petitioner's SRB is internationally certified and accredited with the international standards.



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4. The SRB has been recently introduced in India in order to increase the road safety of Highways. The petitioner is one of the very few companies in India that has the requisite intellectual property to manufacture these SRBs based on International technical know how. The petitioner also has obtained MASH TL-4 certification, i.e., internationally recognised certification with regard to the standard of SRBs that has been granted after testing of the SRBs of the petitioner.

5. While that being so, in the year 2019, by tender notification, dated 04.10.2019, the second respondent, i.e., the Superintending Engineer C&M, Coimbatore had invited tenders from the eligible persons for providing SRBs at km 6/6, 7/10, 8/6, 8/10 of Thalaikundha Kallatty Theppakkadu Road (MDR 700).

6. Like that on 09.10.2019, another tender notification was issued by the said second respondent inviting tenders for the very same SRBs at km 9/10, 10/2, 10/10 (i), (ii) of Thalaikundha Kallatty Theppakkadu Road (MDR 700).



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7. In fact these two tender notifications were under challenge in W.P.Nos.31065 and 31068 of 2019.

8. When those writ petitions were pending before this Court, according to the petitioner, the second respondent permitted the fourth respondent in W.P.Nos.5965 and 5970 of 2020 to install the SRBs at the contract site without even awarding the contract and therefore, which was complained by the petitioner before this Court at the said pending writ petitions, only thereafter the second respondent had come forward to award the contract to the fourth respondent in respect of the two said tenders.

9. In respect of the first tender, the contract was awarded in TRP No.59/2001/DO-1/ dated 21.09.2020 for supply of SRBs at km 6/6, 7/10, 8/6, 8/10 at Thalaikundha Kallatty Theppakkadu Road (MRD 700). In respect of the second tender, contract was awarded to the fourth respondent in TRP No.60/2019/DO-1/dated 29.01.2020 for supply of SRBs at km 9/10, 10/2, 10/10 (i), (ii) of Thalaikundha Kallatty Theppakkadu Road (MRD 700). These two award of contracts are under challenge respectively in



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W.P.Nos.5965 and 5970 of 2020. That is how these four writ petitions were filed before this Court at different point of time and all these writ petitions were taken up for hearing and being decided by this Court in this order.

10. It is the case of the petitioner that, the impugned tenders in question relate to Safety Roller Barriers, i.e., SRB. The Safety Roller Barriers as well as its function is germane to the present writ petitions. The SRBs are longitudinal barriers designed to contain, redirect and yield vehicles from road side barriers. When during the course of movement, the vehicle hits the roller barrier, the roller barrier absorb the shock of the impact and by the rolling movement of the rollers, the vehicle is redirected towards the driving lane. The vehicle when makes impact to the rollers, the rollers convert the impact energy to rotational energy simultaneously and hence prevents heavy loss to the vehicle and ultimately prevents fatality in the accidents, thereby saving the lives.

11. It is the further case of the petitioner that, the SRBs are important safety features in highways as it can minimise the loss and damage caused



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due to accidents thereby save human lives. It is the further claim of the petitioner that, the petitioner is having wherewithal, requisite capabilities for providing these SRBs. ETI Limited holds patents for superior quality of SRBs and the petitioner has the necessary agreements with the ETI Limited to supply these patented products in India.

12. In this context, it is the case of the petitioner that, the very tender notification issued which are impugned in W.P.Nos.31065 and 31068 of 2019 having tailor made conditions or specifications, only to make one or two in an advantageous position to suit their convenience enabling them to get success in the tender process and thereby the other players like the petitioner who are having the internationally acclaimed system as stated supra would be eliminated from the process of tender itself.

13. Since the said tender notification itself, according to the petitioner is in violation of the provisions of the Tamil Nadu Transparency in Tenders Act, especially Rule 13 of the Tamil Nadu Transparency in Tenders Rules 2000, the petitioner did not participate in the tender process as it had decided to challenge the very tender notification itself.



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14. When that being so, during the pendency of the earlier two writ petitions challenging the tender notifications, the second respondent had come forward to permit the fourth respondent to start the work, accordingly the fourth respondent started erecting the SRBs at the contract site and when this was questioned by bringing it to the notice of this Court, only thereafter the second respondent had come forward to award the contract to the fourth respondent in respect of both the tenders only on 29.01.2020. Therefore it had become necessitated for the petitioner to challenge the impugned award of contract in favour of the fourth respondent.

15. It is the further case of the petitioner that, the very important condition of this tender is, that the participants must have obtained Mash TL-4 certification. Without this Mash TL-4 certification, the SRBs to be supplied by any contractor should not be accepted and since it is a pre-condition that they must have the Mash TL-4 certification, without which if any tender is filed by any bidder, the same should have been rejected.



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16. However the second respondent knowing well that, the fourth respondent did not have the Mash TL-4 certificate, having accepted the tender submitted by the fourth respondent, permitted them to start the work even before awarding the contract, thereby first of all, there has been tailor made conditions in the tender notification, secondly even the conditions imposed in the tender notification has been floated as it has not been strictly followed in the case of the fourth respondent as admittedly the Mash TL-4 certification was not available with the fourth respondent even at the time of making the tender and without even verifying the Mash TL-4 certificate whether is available with the fourth respondent, the fourth respondent was permitted to commence the work in the year 2019 itself, whereas the contract was awarded only on January 2020, i.e., on 29.01.2020, that too after the petitioner made a complaint before this Court during the pendency of the first two writ petitions and thereafter hurriedly impugned award of contract was made in favour of the fourth respondent on 29.01.2020, that is the subject matter in the subsequent writ petitions. By making all these actions, inaction or arbitrary actions, the second respondent has completely violated all norms of the Tamil Nadu Transparency in Tender Act and the



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Rules made thereunder and the very notification of tender issued in this regard as well as the award of contract given to the fourth respondent is biased, arbitrary, unlawful and violative of the provisions of the Act as well as the Rules. Therefore for all these reasons, these tender notifications and the consequential award of contracts to the fourth respondent are to be interfered with and set aside by this Court.

17. Meeting the aforestated stand taken by the petitioner, the second respondent being the contesting respondent has filed the counter affidavit, where *inter alia* the second respondent has stated the following :

"34. In so far as the averments raised in Ground H, this respondent submits that in agreement it has been clearly mentioned that MASH TL-4 certificate has to be produced before commencement of work. The Department cannot insist the contractor to get the MASH TL-4 certificate from a particular agency. Therefore the statement that illegal award of tender is false. For trial purpose a small stretch was done and further progress was withheld for production of MASH



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TL-4 certificate. As per notice of the Divisional Engineer (H), C&M, Udthagai, vide Lr.No.19/2019/JDO/Dated 17.12.2019 has instructed the contractor not to execute the work before satisfying the MASH TL-4 certificate. Hence, the work is stopped and it should be resumed only after submitting necessary MASH TL-4 certificate and other standard specifications.

35. In so far as the averments raised in Ground I, this respondent submits that already three different contractors participated the tender itself shows the specification is not tailor made one. In our specifications MASH TL-4 certificate is made compulsory for executing safety roller barrier work.

36. I submit that before execution of work the contractor has been instructed to follow all technical specifications. After completion of work the accident will be completely reduced and loss of human lives will not occur.

37. I submit that the tender documents are as per Tender Transparency Act and as per tender rules and as per Highways Department circulars. The respondents are not violating any Act or Rules.



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38. I further submit that the petitioners should not compel the department to mention the dimensions and size of their products. The browse in the net for various types of safety roller barrier and analyses the advantages and disadvantages of particular roller barriers we finalize the size and dimensions of the safety roller barrier which is most suitable for us. If the competitor likes to participate in the tender they have to manufacture the safety roller as per our requirement and should not insist us to change the dimension and size of safety roller barrier.

39. I humbly submit that Technical specifications are prepared unbiased and it is proved in the tender Notice No.11/2019-20 / HDO / Dated 04.10.2019 and Tender notice No.12/2019-20 / HDO / Dt. 09.10.2019 where three different bidders from three different places were participated.

40. I submit that both the tenders were awarded to the lowest bidder. It clearly indicates in the finance bid evaluation summary where the lowest rate quoted bidder was accepted and others were rejected. The lowest bidder has been uploaded



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through TRP No.59/2019/DO-1 / Dated 06.11.2019 and TRP No.60/2019/DO-1 / Dated 12.11.2019. Work order was issued to the contractor on 14.11.2019 and agreement was executed on 26.11.2019 and the same has been communicated to the third respondent on 27.11.2019. But TRP No.59/2019 / DO-1 / Dated 29.01.2020 and TRP No.60/2019 / DO-1 / Dated 29.01.2020 statement containing the date of agreement as 26.11.2019 was uploaded on 29.01.2020 only due to inattention of the official concerned. But the work order copy was already served to the contractor vide this office TRP No.59/2019 / DO-1 / Dated 14.11.2019 and TRP No.60 / 2019 / DO-1 / Dated 14.11.2019. The agreement has been handed over to the third respondent on 27.11.2019. As per Tamil Nadu Tender Transparency Act after selection, a letter of Award (work order) shall be issued, in duplicate, by the procuring entity to the lowest tenderer with the condition that the lowest tenderer shall, within 7 (seven) days of the receipt of the letter of Award (work order), sign and return a duplicate copy of the letter of Award (work order) in



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acknowledgment thereof. We received the duplicate copy of the letter of award (work order) with acknowledgment of the successful bidder within the time to this office (copy enclosed).

41. I further submit that in tender conditions it is clearly mentioned that MASH TL-4 certificate should be produced before execution of the work. The third respondent insisted the same vide the Divisional Engineer (H), C&M, Udhagai, Lr.No.16/2019 / JDO / Dated 05.12.2019.

42. As per notice of the Divisional Engineer (H), C&M. Udhagai, vide Lr.No.19/2019 / JDO / Dated 17.12.2019 instructed the contractor to execute the work after submitting MASH TL-4 certificate and following other specifications of safety roller barriers. For trial purposes a small stretch was done and further progress was withheld for production of MASH TL-4 certificate. The required preliminary assessment of the crash test indicates that the Roller Barrier Guardrail system has passed the evaluation criteria for MASH TL-4 test."



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18. On the part of the fourth respondent, who is the Awardee of the tender, he has filed a common additional affidavit, where *inter alia*, the fourth respondent has stated the following :

"6. It is submitted that, so far as the 4th respondent is concerned, it is a Private Limited Company having an industrial unit at SIPCOT Industrial Complex, Pudukottai District. The said unit is manufacturing all the road safety products like all type of metal beam crash barriers, Road signage Boards (Gantry Boards) etc., It is employing about 300 workers for its manufacturing activities.

7. It is submitted that, during the year 2016 & 2018, the deponent visited the 'Intertraffic' an International Trade show in Amsterdam wherein the deponent found display of various road safety products, including Safety Roller Barrier System manufactured by various global players like ETI Ltd., & KSI Global Australia Pty. Ltd., and other Chinese & Korean companies. The deponent, being an industrialist, was inspired to manufacture the Safety Roller Barrier System in his own industrial unit at SIPCOT Industrial Complex,



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Pudukottai District. It is during this point of time the deponent came across the tender notifications issued by the Tamil Nadu Highways Department inviting tender for the supply of Safety Roller Barrier System with a condition of obtaining MASH TL 4 before execution of work. The deponent took various steps and invested about 15 crores for inclusion of the manufacture of Safety Roller Barrier System and installed galvanising unit, fabrication units etc., by seeking the help and assistance of specialists in that field, in his industrial unit SIPCOT Industrial Complex, Pudukottai District. The Deponent was successful in manufacture of Safety Roller Barrier System.

8. It is submitted that, when the 4th Respondent became the successful bidder, he was asked to prove the safety working of the Safety Roller Barrier System on a trial run basis. During the trial run, the 4th Respondent was successful in proving the safety working of the Safety Roller Barrier System. It is thereafter, the 4th Respondent took steps in obtaining MASH TL 4 from Texas A & M Transportation Institute, Texas, America as per the requirement of the tender notification. The



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petitioner sent the Safety Roller Barrier System manufactured from its unit to Texas to obtain MASH TL 4 certificate. On account of the Covid-19 situation prevailing all over the world, there was a delay in obtaining the MASH TL 4 certificate by the 4th Respondent. The 4th Respondent obtained the MASH TL 4 certificate on 11.10.2021 and the Safety Roller Barrier System manufactured by the 4th Respondent conformed the requirements of MASH TL 4 certification standards. The 4th Respondent produced the said certificate to the 2nd & 3rd Respondents on 12.10.2021.

9. It is submitted that the writ petitioner did not take part in the bidding process and since there was no other company in India engaged in the manufacturing of the Safety Roller Barrier System and they have to rely on either ETI or KSI Global Australia Pty., Ltd., prior to the 4th Respondent commencing its manufacturing of Safety Roller Barrier System during June 2018, the writ petitioner was enjoying the monopoly of supplying the Safety Roller Barrier System and he wants to perpetuate the monopoly and he does not want any



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Indian industries to manufacture and supply the Safety Roller Barrier Systems. The 4th Respondent is the only company in India to manufacture Safety Roller Barrier System, that too in an Industrially backward area namely Pudukottai. Further, it is submitted that the 4th Respondent is the only company in India who has MASH TL 4 certificate. It is submitted that, the writ petitioner does not manufacture Safety Roller Barrier System. The writ petitioner procures the Safety Roller Barrier System from Korea and supplies it. As already stated, the 4th Respondent is providing employment to 300 persons and manufacturing Safety Roller Barrier System. On account of the pendency of writ petition and the interim order dated 16.03.2020, the 4th Respondent could not fully engage in the manufacture of Safety Roller Barrier System in its unit which is fully equipped and ready."

19. The fourth respondent also has produced the Mash Test 4-12 on safety roller barrier guard system certificate, dated 10.11.2021, where among other things, the following has been stated :



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"The purpose of the test reported herein was to assess the performance of Hariway Lines Pvt., Ltd's Safety Roller Barrier Guard System according to the safety-performance evaluation guidelines included in the American Association of State Highway and Transportation Officials (AASHTO) Manual for Assessing Safety Hardware, Second Edition (MASH). The crash test was performed in accordance with MASH Test 4-12, which involves a 10000S vehicle with a nominal weight of 10000 Kg (22,000 lb) impacting the longitudinal barrier while traveling at 90 km/h (56 mi/h) and 15 degrees.

This report provides details on the Safety Roller Barrier Guard System, the crash test and results, and the performance assessment of the Safety Roller Barrier Guard System for MASH Test 4-12 longitudinal barrier evaluation criteria.

The Safety Roller Barrier Guard System met the performance criteria for MASH Test 4-12 for longitudinal barriers."

20. In response to these common additional affidavit filed by the



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fourth respondent, the petitioner has filed counter, wherein *inter alia*, the petitioner has stated the following :

5. I state that subsequent to the date of filing of the Additional Affidavit by the Respondent No.4 on 7.11.2022 and the order of this Hon'ble Court dated 07.11.2022, I have personally visited the site of installation of the alleged trial work on 09.11.2022 and have personally taken measurements and also have had photographs taken. On inspection, I find that the dimensions of the roller safety barrier system installed by the Respondent No.4, which is now being referred to as a trial installation is substantially different from the dimensions of the roller safety barrier in respect of which the Respondent No.4 has obtained a MASH TL-4 certificate in September, 2021. A table reflecting such difference is below :

<i>Specification</i>	<i>Dimensions of installation by Respondent No.4 for alleged trial work</i>	<i>Dimension of roller safety barrier for which MASH TL-4 has been issued to Respondent No.4 in September, 2021</i>	<i>Dimension of roller safety barrier as set out in Impugned Tenders</i>
Finished	1060mm	865mm	890mm
Nominal rail height			
Thickness of 'Rail Section Sleeve'	3.0 MM	5.0 MM	3.0 MM
Post spacing	>1350mm	1333mm	<1350mm
Rail Section	<6000mm	6000mm	5995mm



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21. With these pleadings and supportive documents, the learned counsel appearing for the parties made submissions.

22. Mr.Sathish Parasaran, learned Senior counsel appearing for the petitioner has submitted that, after issuance of the tender notification, on 19.10.2019, the petitioner has sent certain objections to the respondents, where it was specifically stated that, the technical specifications mentioned are only related to the sizes and dimensions of one type of Safety Roller Barrier and the specifications of the petitioner system have not been included in the tender and this itself shows that, only one particular brand is being promoted, which is strictly against the Tamil Nadu Transparency in Tenders Act. It was further objected that, in the special conditions for Safety Roller Barrier, it is mentioned that, the whole system should be MASH TL-4 certificate and the copy of the certificate shall be submitted before the execution of the work. In respect of this kind of objection raised by the petitioner, the learned Senior counsel would submit that, the second respondent by his reply, dated 23.10.2019 had stated that, the dimension



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and size of the material should not be changed for accommodating a particular supplier contractor. MASH TL-4 test is one of the most important test to ascertain the quality of Safety Roller Crash Barrier. Moreover, there is no specific IRC code available for Roller Crash Barrier, hence, it is not possible to compel them to get accreditation from IRC and it was also not possible to extend or postpone the tender date without any valid reason.

23. Subsequently once again on 29.10.2019, further letter has been given raising similar objections by the petitioner, but no reply has come and ultimately without even awarding the contract in favour of the fourth respondent, the second respondent permitted the fourth respondent to go ahead with the work at the contract site to the extent of 60 metres.

24. The learned Senior counsel appearing for the petitioner has further pointed out that, the second respondent by letter, dated 01.11.2019 has stated that, the petitioner cannot compel to buy the products of the petitioner or compel to include the size and dimension of the product of the petitioner. It was further replied by the second respondent that, using the past



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experience in the Highways Department, they have adopted a particular size and dimension for Safety Roller Barrier. They further stated that, various suggestions from various companies regarding the quality of the product were requested for and ultimately after evaluating them it was finalised. Therefore it was not possible to change the conditions and the respondents, i.e., the second respondent have already insisted Mash TL-4 certificate for the quality of Safety Roller Barrier, i.e., SRB.

25. It has been further stated by the second respondent in their reply, dated 01.11.2019 that, already Safety Roller Barrier have been fixed in some roads of Tamil Nadu and in some places tenders are lying for purchasing of Safety Roller Barriers. Hence, the quality of Safety Roller Barrier will be the main criteria with low cost, in order to save the public money.

26. Pointing out these kind of communications between the petitioner and the second respondent, the learned Senior counsel appearing for the petitioner has submitted that, even though specific objection had been raised by the petitioner to alter the conditions or specifications stipulated in the



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tender document uniformly to suit all the players in the field, that was specifically rejected or refused by the second respondent consistently for the reason best known to them, knowing well that the specifications fixed by the second respondent in tender documentation would be suitable only to a particular product.

27. In this context, the learned Senior counsel appearing for the petitioner has relied upon Rule 13 of the 2020 Rules.

28. That apart, the learned Senior counsel appearing for the petitioner has relied upon various decisions, where he insisted upon the law laid down by the Hon'ble Supreme Court in (2014) 3 SCC 760, Maa Binda Express Carrier v. North-East Frontier Railway, where he relied upon the following passage :

"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the



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



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relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

29. By making these submissions, the learned Senior counsel appearing for the petitioner has sought for interference from this Court against the impugned documents and to quash the tender notification as well as the consequential award of contract by the second respondent to the fourth respondent.

30. On the other hand, Mr.A.L.Somayaji, learned Senior counsel appearing for the fourth respondent, who is the Awardee of the contract has submitted that, the complaint made by the petitioner against the fourth respondent that, it did not have the Mash TL-4 certification and without which the contract was awarded is incorrect, because during the COVID-19 pandemic situation, the fourth respondent could not immediately get the certification of Mash TL-4 and subsequently it was able to get the certificate by September 2021 and as per the tender conditions, such Mash TL-4 certificate should be made available before actual commencement of the work.

31. The learned Senior counsel would further submit that, in respect



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of the case projected by the petitioner that, there are only two players in the field of SRBs globally, one is KSI Global Australia Pty., Limited, in short KSI Global and another one is ETI Limited, these statement of the petitioner also is incorrect because number of such global players are there globally and this kind of Safety Roller Barriers are being manufactured at various countries.

32. The learned Senior counsel would further submit that, insofar as the fourth respondent is concerned, it is a Private Limited company having an industrial unit at SIPCOT Industrial Complex, Pudukottai District and the unit is manufacturing all the road safety products like metal beam crash barriers, Road signage boards etc., and it is employed about 300 workers for its manufacturing activities.

33. He would further submit that, the Managing Director of the fourth respondent visited the International Trade show at Amsterdam, where he witnessed the display of Safety Roller Barriers system manufactured by various global players like ETI Ltd., KSI Global Australia Pty., Ltd., and



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other Chinese and Korean companies and he being an industrialist was inspired to manufacture Safety Roller Barrier system in his own industrial unit at SIPCOT Industrial complex and only at that time notification was issued by the Highways Department inviting tender for supply of Safety Roller Barrier system with a condition of obtaining Mash TL-4 certificate before execution of the work.

34. Thereafter the fourth respondent invested huge money for inclusion of manufacture of SRBs also and installed galvanising unit, fabrication unit etc., by getting the assistance and help of specialist in the field in its industrial unit and he has become successful manufacturer of SRBs in India.

35. In the meanwhile, since the fourth respondent became the successful bidder, he was asked to prove the safety working of the SRBs on a trial run basis and during the trial run, the fourth respondent was successful in proving the safety working of the SRBs. Thereafter the fourth respondent took steps in obtaining Mash TL-4 certificate from Texas A&M



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Transportation Ltd., at Texas, United States of America as per the requirement of the tender notification.

36. Though the petitioner sent the SRBs manufactured from the unit of the petitioner to obtain Mash TL-4 certificate, in view of the COVID-19 pandemic situation which was prevailing all over the world, there was a delay in obtaining the Mash TL-4 certificate, which was obtained only on 11.10.2021 and the Mash TL-4 certification has been given to the manufactured SRBs of the fourth respondent.

37. The installation made by the fourth respondent at the instance of the second respondent for a short distance is only a trial run or on trial basis, therefore it cannot be said to be the commencement of the entire contract work, therefore the complaint made in this regard by the petitioner that, without even awarding the contract or giving work order to the fourth respondent, it had started the SRBs in the contract site, thereby the very main conditions imposed by the second respondent in the tender document since has been floated, therefore the very tender awarded to the fourth



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respondent is to be cancelled, cannot be countenanced.

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38. The learned Senior counsel would also make submissions that, whether it is a tailor made conditions imposed by the second respondent in the tender notification and based on which, the petitioner can have a presentable case before this Court in challenging the tender notification as well as the award of the contract to the fourth respondent would be suitably met by the second respondent. He would also submit that, insofar as the safety and worthiness of the SRBs produced by the fourth respondent in its manufacturing unit as stated supra, since it has been testified by internationally acclaimed testing agency or centre at Texas, United State of America and Mash TL-4 certificate since has been obtained by the fourth respondent on 11.10.2021 and only thereafter the work would be commenced by the fourth respondent, there could be absolutely no impediment for the fourth respondent to continue the contract work awarded to him and in this regard, the petitioner being a non-participant of the tender process and infact he is not entitled or eligible even to participate in the tender process, he has no locus to file these writ petitions, therefore in



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respect of *locus standi* of the petitioner also, the learned Senior counsel raised objection that, first, the petitioner has to prove its *locus standi* to maintain all these writ petitions.

39. Apart from the aforestated submissions, the learned Senior counsel appearing for the fourth respondent would also rely upon various Judgments of the Hon'ble Apex Court as well as this Court including the latest Judgment, i.e., 2022 Live Law SCC 814 in Civil Appeal Nos. 6615 to 6616 of 2022, dated 30th September 2022, in the matter of Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR) & Others, where the learned Senior counsel relies upon the following passages of the Hon'ble Supreme Court.

"5. We have heard learned counsel for the respective parties at length.

At the outset, it is required to be noted that respondent No.1 claiming to be a non-profit organisation carrying out research, advisory and advocacy in the field of civil aviation had filed a writ petition challenging the tender conditions in



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the respective RFPs. It is required to be noted that none of the GHAs who participated in the tender process and/or could have participated in the tender process have challenged the tender conditions. It is required to be noted that the writ petition before the High Court was not in the nature of Public Interest Litigation. In that view of the matter, it is not appreciable how respondent No.1 - original writ petitioner being an NGO would have any locus standi to maintain the writ petition challenging the tender conditions in the respective RFPs. Respondent No.1 cannot be said to be an "aggrieved party". Therefore, in the present case, the High Court has erred in entertaining the writ petition at the instance of respondent No.1, challenging the eligibility criteria/tender conditions mentioned in the respective RFPs. The High Court ought to have dismissed the writ petition on the ground of locus standi of respondent No.1 - original writ petitioner to maintain the writ petition.

6. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers



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under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.

...

...

...

9. Having gone through the respective clauses/conditions which are held to be arbitrary and illegal by the High Court, we are of the opinion that the same cannot be said to be arbitrary and/or mala fide and/or actuated by bias. It was for the AAI to decide its own terms and fix the eligibility criteria."



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40. By making these submissions, the learned Senior counsel seeks rejection of these writ petitions as devoid of merit.

41. Mr.J.Ravindran, learned Additional Advocate General appearing for the official respondents, i.e., R1 to R3 has made submissions stating that, he raise preliminary objection against the petitioner with regard to the locus of the petitioner and maintainability of these writ petitions. In this regard, he relies upon Clause 2 of the tender document, which reads thus :

"The bidder should be a registered Class-I contractor in the Tamil Nadu Highways Department with digital signature certificate."

42. Relying upon this clause, he would submit that, unless a bidder is a registered Class-I contractor in the Tamil Nadu Highways Department, he would not even be eligible to make the tender. Knowing well this position, the petitioner in fact has not participated in the tender and the person who is otherwise not even eligible to participate in the tender, whether can question the tender document or its specification or condition or award of the contract is the question.



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43. In this regard, the learned Additional Advocate General would submit that, a person not even eligible to participate in the tender cannot question the specifications or conditions imposed by the tender inviting authority, as such kind of litigation being an adversarial one cannot be accepted unless his eligibility is proved before this Court. In support of his contention, the learned Additional Advocate General has relied upon some of the decisions of the Law Courts.

44. The learned Additional Advocate General would also submit that, insofar as the complaint made by the petitioner that, the conditions made in the tender document are tailor made in order to suit one or few people is concerned, such kind of complaint cannot be made by the petitioner, because what is the best suitable specification is to be decided only by the tender calling authority and not by one of the contractor or bidder.

45. Moreover whatever the specification is fixed, it may suit for somebody may not suit for somebody, therefore in order to suit the condition for everyone, specification cannot be prescribed as the purpose of calling the



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tender is to procure the material with proper specification as per the requirement of the Department concerned and therefore, in this regard, the very complaint made by the petitioner that it is a tailor made condition cannot be sustained, he contended.

46. Insofar as the scope of Judicial Review in respect of tender cases is concerned, it has been well settled by many number of pronouncements by law Courts, that the Court must be slow in interfering with the tender process and unless and until it is proved that it is malafidely in order to award the contract to X, such kind of conditions are imposed, even in that case, the tender process cannot be interfered as per the latest Judgment of the Hon'ble Surpeme Court and the parties can only be relegated to go before the appropriate forum to seek for damages, if any.

47. In this regard, the learned Additional Advocate General has relied upon the following Judgments :

(i) In Jashbai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed



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& others, reported in (1976) 1 SCC 671, the Hon'ble Supreme Court has held as follows :

"8. The High Court, however, dismissed the writ petition on the ground that no right vested in the appellant had been infringed, or prejudiced or adversely affected as a direct consequence of the order impugned by him, and as such, he was not an "aggrieved person" having a locus standi in the matter.

...

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...

12. According to most English decisions in order to have the locus standi to invoke certiorari jurisdiction, the petitioner should be an "aggrieved person" and, in a case of defect of jurisdiction, such a petitioner will be entitled to a writ of certiorari as a matter of course, but if he does not fulfil that character, and is a "stranger", the Court will, in its discretion, deny him this extraordinary remedy, save in very special circumstances."

(ii) In National Highways Authority of India v. Gwalior-Jhansi



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Expressway Limited, reported in (2018) 8 SCC 243, the Hon'ble Supreme

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Court has held as follows :

"16... Having failed to participate in the bid process in 2016, it was not possible to examine the eligibility and qualification of the respondent in the context of tender documents of 2016. Further, a person or entity who stands out of the tender process or fails to comply with the terms and conditions of the tender documents cannot acquire any right or interest much less actionable claim in respect of such tender process. According to the appellant, the respondent must take the consequences of non-participation in the subject tender process and cannot be allowed to interdict the same in absence of an express exemption granted by the competent forum / Authority to the respondent not to participate in the tender process and yet exercise ROFR. To buttress the aforesaid submission, reliance has been placed on the decision of the Delhi High Court in VHCPL-ADCC Pingalai Infrastructure (P) Ltd., v. Union of India [2010 SCC Online Del 2687] and on the decision of the Appellate Tribunal for Electricity in



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Raj West Power Ltd., v. Rajasthan Electricity
Regulatory Commission [2013 SCC Online Aptel
46]."

48. Insofar as the complaint with regard to the tailor made condition is concerned, the learned Additional Advocate General would submit that, there were totally three bidders participated, therefore had the conditions been only tailor made to suit the convenience of the fourth respondent alone, other two bidders would not have participated.

49. In support of the said plea on the part of the respondents, that it is not a tailor made condition and on that score, the tender document cannot be successfully assailed by the petitioner who is not at all eligible to participate in the tender, the learned Additional Advocate General has relied upon the following citations :

(i) In K.Kumara Gupta v. Sri Markendaya and Sri Omkareswara Swamy Temple and others, reported in (2022) 5 SCC 710, the Hon'ble Supreme Court has held as follow :

"21. In fact, the learned Single Judge had passed a



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detailed judgment and order quashing and setting aside the order passed by the Government dated 26.11.1999. The learned Single Judge specifically observed in paras 8, 9, 12 and 14 as under:-

“8. The repeated orders of the second respondent passed time and again in this matter are found to be without assigning any cogent reasons. Under the Indian Contract Act, which is a Central Act, having an over riding effect upon the Endowments Act, more particularly when the matter pertains to contractual obligations between both the parties i.e., between the vendor and the vendee and also when the matter pertains to tender-cum-auction, where both parties have fulfilled their part of obligations and where no fraud played by the parties has been established, the action of the second respondent in canceling the sale deed is unwarranted. The conduct of the 4th respondent cannot be appreciated, where he has not participated in the tender-cum-auction and more so, he is not an affected party. Only after knowing the tender and auction amount, the 4th respondent appears to have either got tempted by the sale of the property or he has been planted by the persons



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having vested interest. This kind of conduct cannot be encouraged. It is an undisputed fact that petitioner, 45 persons filed tenders and participated in the auction, nothing prevented the 4th respondent from filing tender and participating in the auction.

9. As stated supra, the respondents have not made out a case of fraud in conducting the sale and also they have not raised any objection at the time of conducting sale proceedings. The respondents conveniently causing interference, at a later stage cannot be accepted and they are estopped from raising objections after conducting the sale proceedings...."

(ii) In *Uflex Limited v. Government of Tamil Nadu and others* reported in (2022) 1 SCC 165, the Hon'ble Supreme Court has held as follows :

"42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every



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succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular* [(1994) 6 SCC 651] and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them."

(iii) In *Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR) & others* reported in 2022 SCC Online SC 1334, the Hon'ble Supreme Court has held as follows :

"31. In the aforesaid decision, it is further observed



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that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

32. Similar views have been expressed in the case of Educomp Datamatics Ltd. (supra) and Meerut Development Authority (supra).

33. In the present case, the AAI explained before the High Court the rationale behind the respective conditions, namely, clustering of 49 airports into 4 region-wise sub-categories/clusters; criteria for evaluation - 36 months experience in past 7 years in providing 3 out of 7 Core GHS and the financial capacity - Annual Turnover of Rs. 30 crores (modified as Rs. 18 crores) in any one of last three financial years.

34. Having gone through the respective clauses/conditions which are held to be arbitrary and illegal by the High Court, we are of the opinion that the same cannot be said to be



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arbitrary and/or mala fide and/or actuated by bias.

It was for the AAI to decide its own terms and fix the eligibility criteria."

(iv) In *Tata Cellular v. Union of India*, reported in (1994) 6 SCC 651, the Hon'ble Supreme Court has held as follows :

"77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative



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action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind [(1991) 1 AC 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

50. By relying upon these decisions referred to above, the learned Additional Advocate General would further contend that, first of all the petitioner does not have *locus standi* to challenge the tender notification in



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view of Clause 2 of the tender document, since he is being a non-registered Class-I contractor, he could not have even participated in the tender as he became ineligible to participate in the tender, therefore he does not have any locus to challenge.

51. He would also submit that, what conditions or specifications to be made in the tender document is best to be decided only by the tender calling authority and not by the bidder who wants to make his tender. He would also submit that, insofar as the tender processing activity, the scope of the judicial review is very limited and normally Court would be slow in interfering with the tender matters unless and until, highly arbitrary exercise is noticed glaringly, if it is come to the notice of the Court and malafidely in order to give the tender or do a favour towards a particular individual or company, that too if it shocks the conscience of the Court, it would rarely interfere and even in that kind of cases, the tender process would not be derailed normally and the affected party would only be relegated to go before the forum concerned to seek for damages.



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52. Since to that extent, the law is settled in tender matters, no interference is called for in the present tender process, as the tender floated in 2019 and the award was given in 2020 and because of these writ petitions, the work is halted for all these years and this has been meant for a public road safety in a hill station and hence, the writ petitions are liable to be rejected enabling the second respondent through the fourth respondent to complete the work and to put it for the public use at the earliest, he contended.

53. I have considered the said rival submissions made by the parties at length and have perused the materials placed before this Court.

54. Insofar as the locus of the petitioner to challenge the impugned documents in these writ petitions is concerned, the only objection raised by the respondents is that, as per Clause 2 of the tender document, the bidder should be a registered Class I contractor in the Tamil Nadu Highways Department with digital signature certificate.



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55. In this context, it is the contention of the petitioner that, who is the Class I contractor as already been spelt out, therefore based on the transaction that has been made already by the petitioner, he can very well be treated as a Class I contractor and moreover at the threshold, the petitioner has come to the Court even to challenge the very specification made in floating the tender by filing the first two writ petitions, i.e., W.P.Nos.31065 and 31068 of 2019 and those writ petitions having been entertained and when those writ petitions are pending before this Court, since the tender process was further made by the respondents and at one point of time, without even concluding the tender process by confirming the award of contract in favour of the fourth respondent, it was permitted to do the work at the contract site and when this was complained by the petitioner before this Court, subsequently only, the award of contract was made in January 2020. Therefore these aspects have to be looked into in conjunction to decide as to whether the petitioner has locus to challenge the award of the contract.

56. In fact when these writ petitions came up for hearing, at the



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admission stage, i.e., W.P.Nos.5965 and 5970 of 2020, a learned Judge of this Court, by order, dated 16.03.2020 has passed the following order :

"Mr.Perumal, takes notice for the 4th respondent in W.P.Nos.5965 & 5970 of 2020 and undertakes to file Vakalat today. He seeks time to file counter.

2. Mr.S.R.Rajagopal, learned Additional Advocate General, appearing for the respondents 1 to 3 submitted that the 3rd respondent sent a letter dated 14.03.2020 to the Additional Government Pleader stating as follows:

Letter No.18/2020 Dated 14.03.2020

Sub: W.P.No.5965/2020 &
W.P.No.5970/2020 status report - reg.

I would like to inform that the petitioner has filed the above two writ petition W.P.No.5965/2020 & W.P.No.5970/2020 before the Honourable High Court of Madras, Chennai. In this connection, I like to state that the agreement was executed by the Superintending Engineer (H), C& M, Coimbatore and the contractor M/s. Hariwaylines Pvt. Ltd on 26.11.2019.



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As per the agreement condition MASH TL4 test certificate has to be produced by the contractor before execution of work and the same has been informed to the contractor in Divisional Engineer letter No.16/2019 dated 05.12.2019.

The contractor has executed the work for a length of 60m on trial basis. Since the MASH TL4 test certificate are to be issued by Foreign Agency/ Company. The contractor has represented that they are not able to produce the MASDH TL4 test certificate in time due to Corono Virus issues and he has sought extension of time for 3 months in his letter dated 10.02.2020. No payment has been made for the above trial work and also the balance work will be commenced only after the MASH TL4 test certificate is produced by the contractor. I request you to bring this to the notice of the Honourable High Court.

3. Therefore, he submitted that he will file a counter within two weeks and also further



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submitted that nothing will happen in the meantime. He also clarified that no work will be permitted to be carried out by the 4th respondent unless and until, the 4th respondent produces MASH TL4 test certificate. The said statement is also recorded. Post the matter after two weeks."

57. Therefore it was a stand taken by the second respondent that, the contractor, i.e., the fourth respondent had executed the work for a length of 60 metres on trial basis and since the Mash TL-4 test certificate are to be issued by foreign agency, the contractor had represented that they are not able to produce the certificate in time due to COVID pandemic situation, therefore he had sought for extension of time of three months in his letter, dated 10.02.2020. It was the further stand of the second respondent that, no payment has been made for the said trial work and also the balance work would be commenced only after the Mash TL-4 test certificate is produced by the contractor.

58. Therefore on 16.03.2020, the position was that, the Mash TL-4 certificate was not produced by the fourth respondent, of course due to



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COVID-19 pandemic situation, therefore time was extended for production of the certificate and the trial work also was permitted to go on for some distance, i.e., 60 metres, even for such trial work, no payment has been made and the contractor has been permitted to carryout the work only by producing the Mash TL-4 test certificate.

59. When these issues were pending before this Court and at the threshold since the petitioner had come before this Court to challenge the very specifications made in this regard after making so many objections by way of letter correspondences as stated supra, where the specifications mentioned in the tender document were questioned by the petitioner on the allegation that it would be suitable to only in respect of a particular product and since it was not accepted and negated by the second respondent, that triggered the petitioner to approach this Court by filing the first two writ petitions and subsequently, filed the second two writ petitions, which become necessiated to challenge the award of contract in favour of the fourth respondent despite the fact that, the earlier two writ petitions challenging the very tender notifications itself are pending before this Court.



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60. All these situations if cumulatively be taken into account, this Court feels that, the petitioner has locus to file these writ petitions to challenge earlier the tender notifications, subsequently the award of contract to the fourth respondent. Therefore to that extent, this Court feels that, the petitioner's locus cannot be questioned by the respondents and the point of locus is decided in favour of the petitioner.

61. Coming to the merits of these cases, it is the two main contention raised by the petitioner's side that, first of all, the specifications or conditions imposed in the tender document is tailor made in order to suit a particular product.

62. In this context, it was the claim of the petitioner that, only two company globally are manufacturing these kind of SRBs and the petitioner is having tie up or patent right to have the products of one company which is globally acclaimed according to the petitioner to have such kind of products throughout India and insofar as the fourth respondent is concerned, he did not have any tie up with the another company, which according to the petitioner is the next alternative destination.



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63. When there are two companies, according to the petitioner, there must be two specifications, out of which if one specification is chosen by the second respondent to be incorporated in the tender document as a conditions or specifications, if that would be to suitable either X company or Y company only, only in that context, it is the case of the petitioner to make a complaint that, the specifications or conditions prescribed in the tender document is best suited to X company or it is products and not to Y company or its products. Therefore by prescribing the very specification itself the other players like the petitioners are eliminated from the tender process.

64. In respect of these complaint made by the petitioner, the answer from the fourth respondent was that, the fourth respondent after having acquired the initial technical knowledge and know how with the help of technicians in the field had employed the technicalities and technical know how for manufacturing the SRBs indigenously at its own factory at SIPCOT, Pudukottai, which according to the learned Senior counsel appearing for the fourth respondent is a pioneering effort taken by the fourth respondent who



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has successfully manufactured the SRBs.

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65. If the fourth respondent on its own manufactured SRBs, it need not depend either X company or the Y company, i.e., the global masters or global pioneers as claimed by the petitioner, but the only question now to be decided is whether the SRBs produced or manufactured by the fourth respondent meets the International standard, for which, the only testing method is the Mash TL-4 test method.

66. In this regard, the certification issued by the American testing agency at Texas to and in favour of the fourth respondent discloses that, the Mash means Manual of Assessing Safety Hardware, Second Edition. The crash test was performed in accordance with Mash Test 4-12, which involves 10000S vehicle with a normal weight of 10000 kgs (22000 lb) impacting the longitudinal barrier while traveling at 90 km/h (56 miles / h) and 15 degrees.

67. By stating this, a detailed report has been provided on the Safety



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Roller Barrier Guard System, the crash test and results and the performance assessment of the Safety Roller Barrier Guard System for MASH Test 4-12 for longitudinal barriers evaluation criteria. Finally the certification states that the Safety Roller Barrier Guard System met the performance criteria for Mash TL 4 – 12 for alternative force.

68. Therefore there has been a Mash TL-4 certification issued by the competent authority after testing the product manufactured by the fourth respondent. However the only objection now made on behalf of the petitioner to be testified is that, whether the fourth respondent has been permitted to go ahead with the work of installation of SRBs even before the Mash TL-4 certification is produced before the second respondent.

69. In this context, the fourth respondent has filed an additional affidavit before this Court, dated 01.11.2022, where it has stated that, there was a delay in obtaining the Mash TL-4 certificate by the fourth respondent because of the COVID-19 situation, however the certificate was obtained on 11.10.2021 and the SRB manufactured by the fourth respondent confirmed the requirement of Mash TL-4 certification standard.



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70. It is the further case of the fourth respondent that, it is the only company in India to manufacture Safety Roller Barrier system, that too in an Industrially backward area. It is the further case of the fourth respondent that, it is the only company in India who has Mash TL-4 certificate. It is the further case of the fourth respondent that, the writ petitioner does not manufacture Safety Roller Barrier system, it only procures the SRBs only from Korea and supplies it and therefore according to the fourth respondent, the fourth respondent is not only the supplier, but also manufacturer of SRBs and their products since has been satisfied by the agency at US, which is a internationally acclaimed testing centre, having tested the product has given the Mash TL-4 certificate, therefore absolutely there could be no second opinion to come to a conclusion that, the SRBs produced or manufactured by the fourth respondent is inferior in quality or not meeting the international standards.

71. Therefore the only objection that was raised by the petitioner is that, without even giving the contract awarded or without even verifying the Mash TL-4 certificate, as the same was not produced at that time, i.e., in



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January 2020 or before that, the fourth respondent was permitted to go ahead with the work, that is the against the very tender conditions and floating all principles of tender transparency and therefore on that ground, the learned Senior counsel appearing for the petitioner wanted to assail the impugned documents.

72. However the fact remains that, the condition imposed under tender document is that after awarding the contract before starting the execution of the work, the Mash TL-4 should be obtained and produced by the successful tenderer and only after satisfaction of such certification, such tenderer would be permitted to go ahead with the work.

73. In this context, insofar as the work undertaken for 60 metres are concerned, it is claimed by both the fourth respondent as well as the second respondent that, it was only a trial basis, for which no money was paid to the contractor.

74. If that being so, whether the 60 metres trial work undertaken by the fourth respondent would be form part of the entire contract work and in



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future whether amount would be paid for the said barriers is also a question.

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75. In this context, some photographs recently taken on the very barriers installed by the fourth respondent as trial basis had been produced by the writ petitioner and after seeing the same, prima facie, this Court found that, there are some corrosion in the metal barriers. As per the tender specification, for 20 years or like period, it should be ensured that, there should be no corrosion, but within a span of two years, if it is rusted like as shown in the photographs, which cannot be disputed by the respondents, this Court feel that, even in the installation of SRBs on trial basis for 60 metres have to be revisited by the respondents and to ensure the safety and steadiness with international specification and standard as per the Mash TL-4 test and then only that shall be permitted to be in operational.

76. Insofar as the prescription of conditions or specifications, where it is suitable to X or Y or group of people are concerned, the law is well settled in this regard by a number of decisions passed by this Court.



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77. In this regard, recently I had an occasion to deal with two such tender matters, where similar plea were raised by the respective petitioners in those writ petitions. The first case is W.P.Nos.20283 and 20290 of 2022 in the matter of Pioneer Fil-Med Private Limited v. The Union of India through the Railway Board and others, wherein in the order dated 31.10.2022, among other things, I had passed the following order :

"40. Further as to which condition to be imposed in the tender document is best, to be decided only by the authority who floats the tender and not by the Law Courts. This is also has been held in number of cases.

41. Illustratively some of the cases dealing with these aspects, where orders have been passed by various High Courts can be usefully pressed into service.

42. In 2013 SCC Online Del 1982 in the matter of Consortium of M/s. Siemens Aktiengesellschaft and Siemens Ltd., v. Delhi Metro Rail Corporation Ltd., and anr., the Division Bench of the High Court of Delhi has held as follows :

"15. The law relating to award of contract by the



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

43. In 2014 SCC Online Bom 485 in the matter of



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Vascular Concepts Ltd., v. State of Maharashtra through
Director of Health Services and Others, the Division Bench
of the Bombay High Court in a tender related case has held
as follows :

"26. Tata Cellular (supra) in terms hold that the terms of invitation to tender are not open to judicial scrutiny because invitation of tender is in the realm of contract and the decision to accept the tender or award contract is reached by process of negotiations through several tiers and such decisions are more often than not made by the experts. It highlights the principle that the Government must have freedom of contract and that apart from applying the Wednesbury principle of reasonableness, it must also be free from arbitrariness not affected by bias or by act of malafides.

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28. As far as law relating to tenders is concerned, the narrow scope for judicial review of tender conditions is well settled. In essence, the court can



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only interfere in policy decision if they are arbitrary, discriminatory or malafide and not otherwise. On analysing the aforesaid decisions it is evident that unless administrative action of State is against public interest, is arbitrary and malafide, the courts ought not to interfere in matters of commercial contracts. In many cases, the court would not have expertise to review administrative decisions and the court cannot risk to substitute its own decision. The court should also bear in mind that interfering with the decisions in the matter of award of contracts by the State would also impose heavy administrative burden, and therefore, the court should be cautious and reluctant to interfere with such decisions. The court should also note that a person who willingly participated in tender process had no right to challenge the tender conditions especially after undertaking in writing to comply with the tender terms. "

44. In 2021 SCC Online Del 5014 in the matter of Sabre Gibi Inc v. AIR India Limited and another, a Division Bench of the High Court of Delhi, in a tender related case has held as follows :



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"45. Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness. In the matter on hand, we do not find any illegality, arbitrariness, irrationality or unreasonableness on the part of the expert body while in action. So also, we do not find any bias or mala fides either on the part of the corporation or on the part of the technical expert while taking the decision. Moreover, the decision is taken keeping in mind the public interest and the work experience of the successful bidder."



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(emphasis supplied)"

45. In 2022 SCC Online Cal 2690 in the matter of Airport Authority of India v. Masti Health & Beauty Private Limited and others, in a tender related case, a Division Bench of High Court of Calcutta has held as follows:

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

"13. This Court sounded a word of caution in another judgment reported as *Silppi Constructions*



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

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



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exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts, but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the



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judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the



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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)

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

“26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best



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

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

25. It is also worth noting that learned Single Judge in the present case has found that the clause 3(h) was tailor made to oust the writ petitioner but the said clause is uniformly applicable to all the



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bidders and the said clause was existing in the earlier tender also wherein the writ petitioner had participated without any objection. Hon'ble Supreme Court in the matter of *Balaji Ventures Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.* by order dated 11th of February, 2022 passed in SLP (C) 1616 of 2022 considering the similar issue has held that:

“5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The



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bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

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

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's



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interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

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



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46. Apart from the aforecited cases, there are plethora of decisions by the Law Courts which have, in unequivocal terms, held that, the tender document and the contract entered into pursuant to the tender document is purely a commercial transaction, wherein, the authority who floats the tender alone is entitled to fix the conditions and wherein the view of the Court cannot be employed as to which one would be the best condition that can be imposed or alternative condition whether can be imposed.

47. Moreover the Court must be slow in interfering with the tender matters unless and until the tender conditions are *per se illegal*, arbitrary, shocks the conscience of the Court and has been put in out of sheer malafide.

48. These principles since have been already held in number of cases by Law Courts, if those principles are applied to the facts of these cases, this Court has no hesitation to come to the conclusion that, the arguments advanced by the petitioners side by projecting the cases of the petitioners are untenable and would not make any ground to have a successful challenge against the impugned documents."



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78. The second case is reported in 2022 SCC Online 5248 in the matter of ACS Marine Services Pvt., Ltd., v. Poompuhar Shipping Corporation and others, where I have held as follows :

"40. Moreover what is the intention of a particular clause in tender document is best known to only the author of the tender document. This position has been made clear by number of Judgments of the Law Courts.

41. That apart, these kind of commercial transactions arising out of the tender, normally would not be interfered by the Court for any reasons, unless and until it is established that, there is an arbitrary exercise of power and with malafide intention the tender has not been accepted or tender of another person is accepted.

42. Two latest decisions of the Hon'ble Supreme Court in this context can be usefully referred to herein.

(i) In 2020 SCC Online SC 1035 in the matter of Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K.Roadways, Fleet owners and Transport Contractors and others, in the tender matter, the Hon'ble Supreme Court has held as follows :



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14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, 2016 (16) SCC 818, this Court held:

"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." (page 825) (emphasis supplied)"



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17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench’s conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the



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tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, this Court noted:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest



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at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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

or Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority



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acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.” (pages 531-532) (emphasis supplied)

(ii) In the latest Judgment in (2022) 6 SCC 127 in the matter of N.G.Projects Limited v. Vinod Kumar Jain and others, the Hon'ble Supreme Court has held as follows:

"22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ



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petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona-fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the



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Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."

43. So the terms and conditions of the tender document if it is taken up for interpretation, the Court has held that, the Author is the best person to understand and appreciate its requirement. Therefore its interpretation should not be second guessed by a Court in Judicial Review."



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79. Therefore if we look at the law already been well settled in this regard by evaluating various Judgments, as has been quoted by the learned counsel appearing for both sides as well as the Judgments quoted in my two orders cited supra in the recent cases, it is a well settled proposition of law that, the duty of the court is to confine itself to the question of legality and its concern should be (1) whether a decision making authority exceeded its powers, (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable tribunal would have reached and (5) abused its powers.

80. None of these five criteria have been violated by the respondents in completing the tender process and awarding the contract in favour of the fourth respondent.

81. In one of the latest Judgment of the Hon'ble Supreme Court in NG Products Limited v. Vinod Kumar Jain and others, reported in (2022) 6 SCC 127, the Hon'ble Supreme Court has made it clear that, the approach of the Court should be not to find any fault with magnifying glass in its hands,



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rather the Court should examine as to whether the decision making process is after complying with the procedure contemplated by tender condition. If the Court finds that, there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion, rather than to injunct the execution of the contract. The Injunction or interference in the tender leads to additional cost on the State and is also against public interest, therefore the State and the Citizens suffer twice, firstly by paying escalation cost and secondly by being deprived of the infrastructure, for which the present day Governments are expected to work.

82. If this latest principles of the Supreme Court in interference of tender matters is borne in mind, no Court would interfere in tender matters normally, except in case of highest arbitrariness and malafide in awarding the tender to any third party or individual and even in that case, the challenging party can be relegated to seek for damages.

83. Here in the case in hand, the main complaint made by the



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petitioner that, the condition or specification made in the tender documents are tailor made has no basis and therefore, that complaint is liable to be rejected. The second contention that, without Mash TL-4 certificate, the contract was awarded and therefore, the award of the contract is bad in law. In this context, it is to be noted that, though the contract was awarded, the fourth respondent was not permitted to commence the work. As per the condition of the tender document, work has to be executed only after the production of the Mash TL-4 certificate, which has been done by the fourth respondent sometime in September to November 2020 and thereafter only the fourth respondent would be eligible and entitled to commence the work.

84. Insofar as the trial work taken place in respect of 60 metres are concerned, this Court already has already expressed its view in the earlier paragraphs, as admittedly those work had been undertaken by the fourth respondent even without producing the Mash TL-4 certificate and moreover the latest photographs show that, some corrosion is found place and therefore, in this regard, even though payment has not been made by the second respondent so far to the fourth respondent for such trial work already



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undertaken, this Court feel that, the second respondent shall make an inspection with experts in the field of the 60 metres trial work undertaken by the fourth respondent and to ensure whether it is in conformity with the safety measures and specifications of the tender document especially in the international standards, that is based on Mash TL-4 certification and then only that 60 metres can be taken into account as part of the work, otherwise the second respondent can take action even to the extent of requiring the fourth respondent to redo the work by using the fresh manufactured SRBs.

85. If these measures are taken by the second respondent and ensured by them, this Court feel that no interference is called for either in the tender notifications or in the award of contract to the fourth respondent which are impugned in these writ petitions.

86. For all these reasons, these writ petitions are liable to rejected, accordingly, they are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

13.12.2022



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Index : Yes

Speaking Order : Yes

tsvn

To

1. The Principal Secretary
Government of Tamil Nadu
Highways and Minor Ports Department,
Secretariat,
Chennai - 600 009
2. The Superintending Engineer (H)
C&M, Coimbatore,
Door No.1653, Highways Compound,
Trichy Road, Coimbatore - 641 018.
3. The Divisional Engineer (H)
C&M, Udhagai,
Udhagai.



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R.SURESH KUMAR, J.
tsvn

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