

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 19th December, 2022

IN THE MATTER OF:

+ **W.P.(C) 11752/2022 & CM APPLs. 34979/2022, 42175/2022**

GKC PROJECTS LIMITED

..... Petitioner

Through: Mr. Arun Kathpalia, Sr. Advocate
with Mr. Milanka Chaudhary, Ms.
Ashly Cherian, Ms. Swet Shika and
Mr. Kauser, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA.....Respondent

Through: Mr. Jayant K. Mehta, Sr. Advocate
with Ms. Madhu Sweta, Ms. Raveena
Dewan and Mr. Raghav Bhatia,
Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. Aggrieved by the rejection of its bid with respect to a Request for Proposal ("RFP") issued by the Respondent for Development of a Six-Lane Access Controlled Highway from Ranipur Barsi (Saharanpur District) to Adhoya Musalmana (Ambala District) (From Ch. 45+500 To 84+400) of Shamli – Ambala Section of Bareilly – Ludhiana Economic Corridor on EPC Mode under Bharatmala Pariyojana Phase-I in the State of Haryana (Package-2) (*hereinafter referred to as "Project"*) by communications dated 22.07.2022 and 28.07.2022, the Petitioner has filed the instant petition challenging the said communications.

2. The facts, in brief, leading to the instant petition are as under:

- a) The Petitioner is an unlisted public limited company incorporated under the Companies Act, 1956 and is engaged in the business of infrastructure development and execution of Engineering, Procurement Construction and Commissioning (EPCC) and Lumpsum Turnkey (LSK) facilities in various infrastructure projects in the country.
- b) The Respondent had invited a Request for Proposal (RFP) for the abovementioned project and the Petitioner was one of the bidders in the said project. In response to the Petitioner's bid, the Respondent vide letter dated 15.07.2022 informed the Petitioner that the evaluation committee had noticed certain discrepancies in its bid, stating that the same was not adhering to clauses of the RFP. The Petitioner responded to the query of the Respondent on 21.07.2022 *inter alia* submitting an explanation as to how its balance Capital Reserve Account has been considered to calculate its "Net Worth" as per methodology specified in Clause 2.2.2.9 (ii) of the RFP and it has a "Net Worth" of 49.04 Crores, thereby meeting the Net Worth criteria under the RFP.
- c) On 22.07.2022, the Respondent informed the Petitioner that their bid was rejected on the ground that it does not satisfy the "Net Worth" criteria as defined under Clause 2.2.2 (b) of the RFP. The Petitioner, thereafter, made multiple representations to the Respondent protesting and seeking clarification regarding the decision taken by the Respondent. The representations made by the Petitioner were rejected *vide* communication dated 28.07.2022 on the very same ground.
- d) Under the RFP, the bidder was required to have a minimum Net Worth (Financial Capacity) of Rs.40.56 crores at the close of the

preceding financial year. By way of a corrigendum, the said amount was increased to Rs.42.98 crores. Clause 2.2.2.9 which defines “Net Worth” for the purpose of the RFP and forms the basis of the entire dispute reads as under:

"2.2.2.9 *The Bidder shall enclose with its Technical Bid, to be uploaded on e – tendering and BIMS Portal, submitted as per the format at Appendix-IA, complete with its Annexes, the following:*

- (i) *Certificate(s) from its statutory auditors or the concerned client(s) stating the payments received or in case of a PPP project, the construction carried out by itself, during the past 5 years, in respect of the Eligible Projects. In case a particular job/ contract has been jointly executed by the Bidder (as part of a Joint Venture), it should further support its claim for the payments received or construction carried out by itself in PPP Projects as applicable the share in work done for that particular job/ contract by producing a certificate from its statutory auditor or the client; and*
- (ii) *Certificate(s) from its statutory auditors specifying the net worth of the Bidder, as at the close of the preceding financial year, and also specifying that the methodology adopted for calculating such net worth conforms to the provisions of this Clause 2.2.2.9 (ii). For the purposes of this RFP, net worth (the “Net Worth”) shall mean the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation."*

(emphasis supplied)

- e) According to the Respondent, the material as provided by the Petitioner in the bid does not meet the requirement of having a Net Worth of Rs.42.98 crores.
- f) At this Juncture, it is pertinent to mention the background of the Petitioner in brief. During the year 2019, the Petitioner experienced financial stress attributable to a host of internal and external factors and general economic slowdown, as a result of which one of the financial creditors of the Petitioner, i.e., State Bank of India, Muscat Branch filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the Petitioner for initiation of the Corporate Insolvency Resolution Process (CIRP). The said application was admitted by the NCLT *vide* its Order dated 21.11.2019 resulting in the initiation of CIRP against the Petitioner. *Vide* the same Order an Interim Resolution Professional was appointed and later, on the same person was appointed as the Resolution Professional by the Committee of Creditors (CoC) by way of a resolution passed at the CoC meeting of the Petitioner on 20.12.2019. The Resolution Plan submitted by SMC Infrastructures Private Limited was accepted by the CoC in its 14th Meeting held on 28.10.2020 with a majority vote of 98.77%.
- g) Thereafter, the Resolution Professional had filed an Application under Section 30(6) and 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39 (4) of the IBBI (Insolvency Resolution for Corporate Persons) before the NCLT on 18.12.2020 seeking

approval of the Resolution Plan submitted by SMC Infrastructure Private Limited.

h) *Vide* an Order dated 30.03.2021, the NCLT had allowed the above mentioned plan approval Application and approved the Resolution Plan submitted by SMC Infrastructure Private Limited.

i) The key steps for implementation of the Resolution Plan have been enumerated by the Petitioner. Under the Resolution Plan, the entire outstanding share capital of the Corporate Debtor comprising of 28,361,221 equity shares of INR 10 each and outstanding preference share capital comprising of 176,717,481 redeemable cumulative optionally convertible preference shares of INR 10 each was cancelled/extinguished with effect from the date of Upfront Capital Infusion or 90 days from the NCLT Approval Date, whichever is earlier, without any pay out to the holders of such equity and preference shareholders. The Resolution Plan also proposed for cancellation and extinguishment of 183,930,439 optionally convertible debentures of INR 10 each with effect from the date of Upfront Capital Infusion or 90 days from the NCLT Approval Date, whichever is earlier, without any pay out to the holders of such optionally convertible debentures. The total amount transferred by the Petitioner to the Capital Reserve on this account is INR 29,927,64,530/-, and therefore, the Net Worth of the Petitioner turned positive. The table as furnished by the Petitioner in its petition showing the accounts returned back as capital reserve on account of extinguishment of the existing share capital and other debts due reads as under:

<i>Accounts written back to Capital Reserve</i>	<i>Amounts (in INR)</i>
<i>Equity Share Capital</i>	<i>28,36,12,210</i>
<i>Redeemable Cumulative Optionally Convertible Preference Shares (RCOCPS)</i>	<i>176,71,74,810</i>
<i>Securities Premium</i>	<i>45,31,30,300</i>
<i>Liability towards Premium on Redemption of Optionally Convertible Debentures (OCD)</i>	<i>48,39,72,303</i>
<i>ESOP Outstanding Balance</i>	<i>48,74,907</i>
<i>TOTAL</i>	<i>299,27,64,530</i>

j) This Court issued notice in the petition on 08.08.2022. Pleadings are complete.

3. Heard learned Senior Counsels appearing for the parties and perused the material on record.

4. Mr. Arun Kathpalia, learned Senior Counsel appearing for the Petitioner, has painstakingly drawn attention of this Court towards the account statements and more particularly towards the balance sheets for the years ending on March 31, 2021 and March 31, 2022 to demonstrate as to how the Net Worth of the Petitioner has turned positive due to the extinguishment of liabilities pursuant to the Resolution Plan approved by the NCLT. The figures as pointed by Mr. Kathpalia, the reserves and surplus were negative in the year 2020 i.e., - Rs. 6,879,330,927 which, after the resolution plan, turned positive in the year 2021 to Rs.49,04,09,768/-. The Balance Sheet for the year ending March 31, 2021 reads as under:

GKC PROJECTS LIMITED
CIN: U45200TG2004PLC043015

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Balance sheet as at March 31, 2021

(All amounts in Indian Rupees, except for share data or as otherwise stated)

	Notes	As at March 31, 2021	As at March 31, 2020
Equity and liabilities			
Shareholders' funds			
Share capital	3	-	2,05,07,87,020
Reserves and surplus	4	49,04,09,768	(6,87,93,30,927)
		<u>49,04,09,768</u>	<u>(4,82,85,43,907)</u>
Non-current liabilities			
Long-term borrowings	5	-	-
Deferred tax liability (net)	9	-	-
Other long-term liabilities	8.1	53,56,63,830	68,21,49,599
Long-term provisions	6	1,25,92,347	1,29,80,524
		<u>54,82,56,177</u>	<u>69,51,30,123</u>
Current liabilities			
Short-term borrowings	7	-	9,63,88,95,978
Trade payables			
Total outstanding dues of micro enterprises and small enterprises		-	-
Total outstanding dues of creditors of other than micro	8	41,86,30,492	75,41,05,776
Other current liabilities	8.1	1,34,72,64,333	1,33,35,16,681
Short-term provisions	6	1,86,89,286	16,54,85,001
		<u>1,78,45,84,111</u>	<u>11,69,23,03,436</u>
TOTAL		<u>2,82,32,50,656</u>	<u>7,75,88,89,652</u>
Assets			
Non-current assets			
Property, Plant and Equipment	10	19,22,84,576	44,96,30,519
Intangible assets	10	5,67,015	8,27,015
Capital work-in-progress		-	-
Deferred tax asset (net)	9	42,80,27,989	-
Non-current investments	11	-	15,00,00,000
Loans and advances	12	47,92,21,781	85,38,69,344
Other non-current assets	13.2	41,18,25,509	3,85,83,90,505
		<u>1,51,19,24,870</u>	<u>5,31,27,17,473</u>
Current assets			
Inventories	14	13,44,50,195	15,31,79,761
Trade receivables	13.1	45,08,49,952	56,08,67,329
Cash and bank balances	15	27,88,74,078	36,37,62,522
Loans and advances	12	27,47,13,738	86,61,78,330
Other current assets	13.2	17,24,37,224	89,71,84,238
		<u>1,31,13,25,186</u>	<u>2,44,61,72,179</u>
TOTAL		<u>2,82,32,50,656</u>	<u>7,75,88,89,652</u>

Summary of significant accounting policies

For and on behalf of the Board of Directors of
GKC Projects Limited

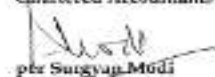
The accompanying notes are an integral part of the financial statements.

As per our report of even date

For MKPS & Associates

ICAI Firm Registration No. 302014E

Chartered Accountants

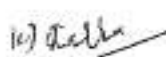

 Mr. Sugyan Modi
 Partner

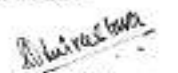
Membership No. 051361

Place: Hyderabad

Date: July 27, 2021

UDIN : 21051361/AAA/V/1420



 Kamal Daryanomal Lalla
 Director
 DIN: 03208439


 Anshu Shrivastava
 Director
 DIN: 05594455


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5. Mr. Kathpalia further submits that the decision of the Technical Evaluation Committee that the Net worth should be calculated on the basis of reserves created only out of revenue profit alone is against Clause 2.2.2.9 and also universally accepted accounting principles which are applied across the board.

6. Mr. Kathpalia draws the attention of this Court towards certain other projects issued by the Ministry of Road, Transport and Highways which have the same criteria for calculating the Net Worth of the bidders as is given in the Clause 2.2.2.3 of the Impugned RFP in the present case. He submits that there is no reason as to why the Respondent/NHAI should take a different view than the one taken by the Ministry of Road, Transport and Highways. Mr. Kathpalia has also drawn the attention of this Court towards various Clauses in the tenders issued by the Ministry of Road, Transport and Highways which are identical to the present case.

7. Mr. Kathpalia further draws attention of this Court towards Public Enterprises Survey (Annual Report on the performance of Central Public Sector Enterprises) published by the Department of Public Enterprises, Ministry of Finance, Government of India, in which the Net Worth of various Central Public Sector Enterprises, including that of the Airports Authority of India (AAI) has been calculated. He has also taken this Court through the definition of Net Worth as given by the Public Enterprises Survey to show that the definition of reserves includes capital reserves and reserves arising out of profit, which reads as under:

"Net Worth means Paid-up Capital, money received against share warrants and all reserves created out of the profits and securities premium account excluding reserves created out of revaluation of assets, write-back of depreciation & amalgamation less accumulated losses, deferred expenditure and miscellaneous expenditure not written off."

8. Mr. Kathpalia, therefore, states that the Respondent has arbitrarily and without any basis rejected the bid of the Petitioner on the ground that they will only consider reserves created out of revenue profit alone to calculate Net

Worth of the Petitioner for this particular contract and not consider Capital reserves.

9. Mr. Kathpalia states that the definition of Net Worth has been interpreted by different authorities in different ways which leads to ambiguity and the Courts must lean against the author of the document and any ambiguity must be read in favour of the bidder in consonance with the rule of *contra proferentum*.

10. Mr. Kathpalia places reliance upon a Judgment passed by this Court in Xcellance Medical Technologies Private Limited vs. HLL Infra Tech Services Ltd. and Ors., **2021 SCC OnLine Del 4635** to state that there has to be legal certainty as to the terms in the tender and there must be a level playing field between the bidders. The relevant portion of the said judgment reads as under:

"38. For the aforesaid reasons, we hold that the specified make criteria did not attach to Items at Serial No. 2(a) and 2(b) of the Technical Specifications.

48. Therefore, to ensure that there is "level playing field" for all the bidders, it is imperative for the tendering authority to make sure that there is certainty in the tender conditions, especially where there have been amendments issued in the tender condition. Changing the rules of the game post the clarification round, should allow the bidders to seek any clarification that they may have, at least in relation to the amendment. Right after the issuance of the Amendment no. 3 on 20.04.2021, the Petitioner had written on 21.04.2021 to the tendering authority to clarify its doubts. The Respondent no. 1 should have been forthcoming with clarifications since the pre-bid meeting was over. We are at pains to understand the attitude of the tender floating authorities. The laudable objectives of "ease of doing business in India" was

frustrated by this high-ended attitude of the respondent. If the aim and objective of an open bidding process is to encourage bidding, and maximize participation to get the optimum price, then the attitude of the Respondent cannot be countenanced. The act of not clarifying the Petitioner's doubt has prejudiced him and left him in the dark. This Act/omission of Respondent no. 1 cannot be to the disadvantage of the petitioner.

50. The doctrine of contra proferentem states that the plain and express meaning of the contract has to be given heed to and in case there is any ambiguity in the contract, then the same is construed against the drafter of the said contract."

11. Mr. Kathpalia further places reliance upon a Judgment passed by the Apex Court in Reliance Energy Ltd. and Another vs. Maharashtra State Road Development Corpn. Ltd and Others, (2007) 8 SCC 1 wherein the Apex Court dealt with the definition of Net Worth in a global tender floated by the State of Maharashtra through Maharashtra State Road Development Corpn. Ltd. The relevant portion of the said judgment reads as under:

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N. [(2007) 2 SCC 1], Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this

doctrine which is invoked by rel/hdec in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of “level playing field” is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. “Globalisation”, in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of “globalisation”. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of “equality” should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This “legal certainty” is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal

and discriminatory treatment. It may violate doctrine of “level playing field”.

39. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India [(2006) 10 SCC 1] the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of “judicial review” cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above “certainty” is an important aspect of the rule of law. In Reliance Airport Developers [(2006) 10 SCC 1] the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.

47. On the second question of future cash impact it may be reiterated that KPMG, the chartered accountants for rel/hdec has invoked the principle of “cash flow reporting” which also finds place in AS 3. According to the said principle of “cash flow reporting”, when P&L accounts and balance sheets are prepared on accrual basis, revenues and expenses are recognised on accrual basis i.e. when the transaction or event occurs. However, timing of cash flow is not reckoned in such system of accounting. Similarly, in cases where accounts are based on accrual system of accounting, recognition of assets and liabilities is not dependent on the actual timing of cash spent on capital expenditure and cash inflow on account of capital receipt. Thus the financial statements prepared on accrual basis do not reflect the timing of the cash flow and amount of cash flow. The object of the cash flow statement is to assess the company's ability to generate the cash flow in future and to assess reasons for difference between “net profit” and “net cash flow” from operations.

50. Taking into account the above principles, it is clear that there are two methods of “cash flow reporting” i.e. direct and indirect. Both give identical results in the matter of the final total. They differ only in presentation of the data. They differ only in presentation of the data contained in the cash flows from operational activities. No reason has been given by the consultants of msrdc for rejecting the indirect method invoked by KPMG, chartered accountants of rel/hdec in their letter dated 12-8-2005. The said method is known as “reconciliation method”.

51. In this case, as stated above, the only reason given by the consultants of msrdc to exclude rel/hdec was the negative impact on the future cash flows on account of the provisioning for doubtful debts in the accounts of

hdec for FY 2001. If future cash impact was the basis to exclude rel/hdec, then the consultants for msrdc should have considered cash flow reporting methods, which includes reconciliation method. There is no question of difference of opinion or different views as far as the application of cash flow reporting is concerned, which also falls in AS 3. There is nothing to show whether indirect method has at all been considered by Crisil, particularly when KPMG had invoked that method. There is no reason given for rejecting it."

12. It is the contention of Mr. Kathpalia that when the same term has been interpreted by various authorities to include Capital Reserves and tenders have been awarded by the Ministry of Road, Transport and Highways based on the same definition, then there should be consistency in the definition of the term Net Worth. He states that it is well settled that one of the important elements of the "rule of law" is legal certainty and Article 14 of the Constitution of India applies to the Government Policies and if the Policy or act of the Government, even in contractual matters, fails to satisfy the test of consistency, then such an Act or decision must be declared unconstitutional. He states that reserves include both, reserves arising out of capital as well as reserves arising out of revenue profit. He, therefore, states that the decision of the Respondent to restrict the reserves only to reserves arising out of revenue profits cannot be accepted.

13. It is submitted by Mr. Kathpalia that if the decision of the Respondent in rejecting the bid of the Petitioner on the ground of it not meeting the minimum Net Worth criterion is accepted, it would set at naught the entire exercise and objective of the CIRP. It was stated that the Petitioner underwent a statutory rehabilitation under the Insolvency and Bankruptcy Code, 2016, and if the decision of the Respondent is not set aside, the entire CIRP of the

Petitioner would be rendered redundant. Furthermore, several companies during a restructuring process, while carrying out the extinguishment of share capital propose transfer of such profits arising from the extinguishment of share capital in a Capital Reserve account. He states that the actions of the Respondent in rejecting the bid of the Petitioner not only goes against the terms of the RFP, but also the scheme of the Resolution Plan approved by the NCLT and objectives of the Insolvency and Bankruptcy Code, 2016.

14. *Per Contra*, Mr. Jayant K. Mehta, learned Senior Counsel appearing for the Respondent/NHAI, contends that the tenders in which the Ministry of Road, Transport and Highways has accepted the Net Worth of the company to include reserves arising out of capital, have not been tested in a Court of law and need not be accepted by the Respondent. The Respondent being the tenderer should be permitted to decide the same on the basis of the eligibility of the bidder. According to him, the purpose of finding out the financial capacity of the bidder is to ascertain as to whether the bidder would be in a position to complete the project and for which purpose the decision of the NHAI to restrict the reserves only to reserves arising out of revenue profit cannot be found fault with. It cannot be said that the decision of NHAI is arbitrary and violative of Article 14 of the Constitution of India. He states that evaluation by the tendering authority should be respected.

15. Mr. Mehta also contends that the definition of Net Worth can differ depending upon the nature of contract and the attending circumstances, and therefore, the definition of Net Worth under the Companies Act need not be accepted in all types of situations. He states that the Financial Consultant submitted its Final Evaluation Report in the month of July 2022 based on the Technical Evaluation of all the bids received from the respective Bidders. Out of nine bids received, only the Petitioner's bid was found to be non-responsive

on the ground of less Net Worth. He states that after receiving the report of the financial consultant of the tendering authority, the Committee deliberated on the report and accepted the report given by the financial consultant. He states that there is no allegation of mala fide that the Petitioner has been singled out for not fulfilling the Financial Capacity criteria i.e. Net Worth criteria as per RFP.

16. Mr. Mehta places reliance upon a judgment passed by this Court in Kanti Commercials Private Limited vs. Union of India and Ors., **MANU/DE/1940/2021** wherein the tendering authority, while considering the bid for expression of interest of the bidder for the disinvestment of Air India Limited, restricted the definition of Net Worth to include only those reserves which are arising out of revenue profit and had not taken into account reserves arising out of capital. He states that the clause in the tender document defining Net Worth in that case is identical to the definition of Net Worth provided under Clause 2.2.2.9 in the Impugned Tender. The relevant portion of the said judgment reads as under:

"2) The PIM provides the 'Eligibility Criteria' in Clause 11 thereof. For our purpose, we may quote Clause 11.2 and Clause 11.3 which deal with 'Financial Capability' in the PIM and reads as follow:

***"11.2 Financial Capability:** For submitting the EOI and for being considered for subsequent qualification for Stage II of the Proposed Transaction, the IB (whether a sole bidder or a Consortium) shall satisfy the following criteria:*

Net Worth: A minimum Net worth of INR 35,000 Mn (INR 3,500 Crore) computed in terms of Clause 11.3 and 11.4.

OR

ACI – A minimum ACI of INR 35,000 Mn (INR 3,500 Crore) computed in terms of Clause 11.3

and 11.4.

Note: Certain special dispensation in respect of Scheduled Airline Operator in India, for manner of satisfying the Financial Capability requirement, are set out in clause 11.3.(b)(ii) and 11.6.(c) below.

11.3 Financial Capability shall be calculated as follows:

a) Net Worth means the aggregate value of the paid-up equity share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet. Provided that for determining the Net Worth, any reserves created out of revaluation of assets, write-back of depreciation and amalgamation, intangible assets, redemption reserves, reserves made for any specific purpose shall not be included. Such methodology shall be applicable even to entities that are not incorporated in India ("Net Worth").

.....

b) Apart from the Net Worth criteria as set out under 11.3 (a), IBs may also qualify on the basis of:

(i) In case of Funds,

(ii) IB, other than Funds, may also qualify on the basis of Net Worth of its Affiliate, provided such IB itself has a positive Net Worth computed in terms of Clause 11.3 and 11.4. "

6) As quoted above, Net Worth means the aggregate value of the paid-up equity share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet. Most relevant for our purpose is the proviso in Clause 11.3(a) which states for determination of the Net Worth, “**any reserves created out of revaluation of assets, write-back of depreciation and amalgamation, intangible assets, redemption reserves, reserves made for any specific purpose shall not be included.** Such methodology shall be applicable even to entities that are not incorporated in India (Net Worth’)”. (emphasis supplied)

12) The Respondent No.3 termed the Petitioners inclusion of amalgamation reserve of INR 297.26 Crores – for the purpose of computation of net worth, as misplaced and fallacious. The Respondent No.3, inter alia, stated in its response as follows:

"13. In regard to Respondent No. 3's commercial views (which were also provided to Respondent No. 1 and 2) on this issue, it is submitted as follows:

a. The term general reserve is not specifically covered in the PIM definition of Net Worth. However, the PIM mentions that all reserves created out of profits and securities premium account are to be included.

b. The Scheme of Amalgamation approved by the Hon'ble High Court itself mentions that —any surplus arising out of the amalgamation, i.e. the difference between the net assets to be transferred to —the transferee company on the one hand and the amount of shares to be allotted to the shareholders of the transferor companies by

the transferee company on the other, shall be credited in the books of the transferee company as a general reserve and may be utilized for the purpose of issuance of bonus shares and payment of dividend by the transferee company.

c. Since the Scheme approved by the Hon'ble High Court states that these reserves are created out of the difference between net asset and amount of shares allotted (rather than explicitly through profits or securities premium account), these reserves may not be considered as a part of Net Worth.

d. Further, it has not been mentioned by the Petitioner that the Hon'ble High Court has stated that the general reserve should be considered as a part of net worth.

e. Hence, Petitioner ought to have been disqualified for not being able to meet the minimum Net Worth requirement.

14. Moreover, since Petitioner had raised the issues of treating the amalgamation reserve as —general reserve in light of an order by the Hon'ble High Court and a legal opinion, the Respondent No. 3 also advised the Respondent No. 1 and 2 to seek legal advice on the same.

15. Accordingly, it is the Respondent No. 3's humble submission that the Petitioner was not eligible in accordance with the eligibility criteria set out in Clause 11 of the PIM.(emphasis supplied)

26) A bare perusal of Clause (f) of the Scheme of

Amalgamation clearly shows that the so-called general reserve of the Petitioner is a surplus arising out of the difference between the value of the net assets to be transferred to the transferee company, i.e. the Petitioner Company, and the value of shares allotted to the shareholders of the Transfer Company. Firstly, we may observe that this General Reserve is only a notional book entry, since the value of the net assets transferred is something determined by the Transferor and Transferee Companies. This general reserve is not created out of the profits of the business conducted by the Transferee i.e. the Petitioner Company. Secondly, this general reserve could be utilised for the purposes of issuance of bonus shares and for payment of dividend by the transferee company. Thus, this so-called general reserve – which is only a book entry, cannot be utilised for the purpose of carrying out the business of the Petitioner Company.

27) On the other hand, Clause 11.3 of the PIM clearly stipulates that reserves made for any specific purpose will not be included in the “net worth”. It also excludes reserves created out of, inter alia, amalgamation.

28) Respondent No.3, which is a professional Firm of Chartered Accountants, and is an expert in the field, has filed their short counter affidavit as well as written submission, and the categorical stand of Respondent No.3 in its capacity as an expert has already been noticed hereinabove.

29) Firstly, we are not inclined to rely upon external sources for determining the meaning of “General Reserve”. The Preliminary Information Memorandum is a complete document in itself. It clearly provides that reserves made for any specific purpose, or reserves created out of, inter alia, amalgamation, shall not be included within the meaning of reserve. For the purpose of computation of Net Worth, it is only the reserve created out of profits and security premium account,

which are relevant. The PIM consciously does not use the expression “General Reserve”. The reason why reserve created out of, inter alia, amalgamation is excluded, is because it does not reflect an actual available reserve – like a reserve created by profits and security premium account, and it is a book entry as it is notional.

30) Additionally, in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd , the Supreme Court has observed that, “the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance.” Furthermore, another important observation in the same judgment is as under:

“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.” "

17. The short questions which arises for our consideration is whether the decision taken by the Respondent while rejecting the bid of the Petitioner on the ground that the Net Worth of the Petitioner is less than Rs.42.98 crores is correct or not and whether it warrants interference by this Court while exercising its jurisdiction under Article 226 of the Constitution of India.

18. Along with the counter affidavit, the Respondent has also filed a Final

Evaluation Report. The case of the Petitioner has been examined and the evaluation regarding Net Worth of the Petitioner as discussed in the Final Evaluation Report reads as under:

5. Name of Bidder: M/s GKC Projects Limited - M/s SMC Infrastructures Private Limited (JV)																																						
Sl. No.	Appendix/ Annexure No.	Project Code	Description of clarifications sought	Bidders' Replies	Our Comments																																	
5.	Annexure III Financial capacity of Bidder	N/A	As per the Clause 2.2.2.9 (a) of RFP, net worth (the "Net Worth") shall mean the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write back of depreciation and amortization. The Lead Member M/s GKC Projects Limited has claimed Net Worth of Rs. 19.01 Cr. as on 31.03.2021 in Annexure III i.e. Financial Capacity of the Bidder and the same is supported by the Statutory Auditor (SA) Certificate which certifies the Net Worth as under: <table><tr><th>S. No.</th><th>Particulars</th><th>Amounts (in Rs.)</th></tr><tr><td>1.</td><td>Equity Share Capital</td><td></td></tr><tr><td>2.</td><td>Reserves and</td><td>49,01,09,768</td></tr><tr><td></td><td>Surplus</td><td></td></tr><tr><td></td><td>Net Worth of the Company as on March 31, 2021</td><td>49,01,09,768</td></tr></table> When the above claimed Net Worth was cross checked from the Balance Sheet as on 31.03.2021, it was observed that the Reserves & Surplus account mainly comprises of Capital Reserve and deficit in statement of profit & loss, as under: <table><tr><th>S. N o.</th><th>Particulars</th><th>Amounts (in Rs.)</th></tr><tr><td>1.</td><td>Securities Premium</td><td>-</td></tr><tr><td>2.</td><td>Capital Reserve Account</td><td>2,09,27,64,590</td></tr><tr><td>3.</td><td>Employee Stock Options Outstanding</td><td>-</td></tr><tr><td>4.</td><td>Surplus in the Statement of Profit & Loss</td><td>(2,50,33,54,76 2)</td></tr><tr><td></td><td>Total Reserves & Surplus</td><td>49,01,09,768</td></tr></table>	S. No.	Particulars	Amounts (in Rs.)	1.	Equity Share Capital		2.	Reserves and	49,01,09,768		Surplus			Net Worth of the Company as on March 31, 2021	49,01,09,768	S. N o.	Particulars	Amounts (in Rs.)	1.	Securities Premium	-	2.	Capital Reserve Account	2,09,27,64,590	3.	Employee Stock Options Outstanding	-	4.	Surplus in the Statement of Profit & Loss	(2,50,33,54,76 2)		Total Reserves & Surplus	49,01,09,768	A note on verification of how the Lead Member, GKC Projects Limited has claimed Net Worth of Rs. 19.01 Cr. and meets relevant qualification Criteria, and how the balance of Capital Reserve Account is considered for calculation of Net worth as per the methodology mentioned in Clause no. 2.2.2.9 (ii) of the RFP is enclosed as Encl.V.	The Bidder in its reply has claimed that the definition of Net Worth as per Clause 2.2.2.9 (ii) of the RFP, is silent regarding the consideration of Reserves created out of Revenue Profit or Capital Profit. And accordingly the net worth has been arrived at on the basis of several of various items pertaining to Equity Share Capital, Securities premium, RXXCPS and liability towards premium on redemption of Optionally convertible debentures (OCDs) amounting to Rs. 299 Crores. As per Para 5 (b) of the Report provided by the Independent Auditor (SA) of the Bidder, the SA has pointed out that the Profit & Loss Statement for the financial year is adjusted for Exceptional Items amounting Rs. 581 Crores pursuant to approved Reselection Plan and decision of the newly appointed management (Refer Note No. 23, 46, 47, 48 & B 110) of the Notes to Financial Statements). Further, it has been noted that as per Note No. 48(i) & 48(ii), various balances of deposits trade receivables along with Input Credits for GST, VAT, Eoem, Service tax etc. are not yet confirmed. It is pertinent to note here that although the Net Worth of Rs. 49.01 Crores claimed by the Bidder is in excess of the minimum requirement of Rs. 42.93 Crores for Financial Capacity as per clause 2.2.2.9 (i) of the RFP, the Bidder has specifically mentioned that these figures are not yet confirmed and are sent for confirmation with the respective customers. And in case for the purpose of calculation of Net Worth, if any, of these unsettled and disputed figures are either unrealized or partially realized, the overall impact on the Net Worth of the Bidder is such that the Bidder fails to meet the minimum eligibility criteria for Financial Capacity. Further, a few issues pertaining to contractual non-performance on part of the Bidder have been observed for which no details have been provided by the Bidder in its bid such as laying of Liquidated Damages of by NRIAL on one of its projects to the tune of Rs. 63 Crores, Initiation of termination proceedings by the lenders for one of its projects with KORDCL.
S. No.	Particulars	Amounts (in Rs.)																																				
1.	Equity Share Capital																																					
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	Total Reserves & Surplus	49,01,09,768																																				
			As per the above mentioned Clause 2.2.2.9 (ii), balance of Capital Reserve Account cannot be considered for calculation of Net Worth as the same is not created out of profits, as a result of this the Assessed Net Worth falls short of the required Financial Capacity of Rs. 42.93 Crores. Hence, the lead member is required to clarify, how the balance of Capital Reserve Account can be considered for calculation of Net Worth as per the methodology specified at Clause 2.2.2.9 (ii) of the RFP.		As a result, for the purpose of calculation of Net Worth for the project, keeping a conservative view pursuant to the unsettled and unconfirmed balances of in the Financial Statements, it has been considered that the Bidder fails to meet the criteria for Financial Capacity. Therefore, the same cannot be considered.																																	

19. The reliance placed by Mr. Mehta, learned Senior Counsel appearing for the Respondent/NHAI, upon Kanti Commercials Private Limited (Supra) is squarely applicable to the facts of the present case. The facts of the said case are more or less identical to the facts of the present case. The Court in that case dealt with the disinvestment of Air India Limited, and there also the tendering authority was considering whether the bidder giving the expression of interest would be in a capacity to complete the project and as to whether the bidder would have the financial capacity to operate the airlines. In that case, the decision of the tendering authority to restrict the reserves only to reserves arising out of revenue profit had been accepted by this Court.

19. The law regarding interference with the decision taken by the tendering authority has been well settled by the Apex Court. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr., (2016) 16 SCC 818, the Supreme Court has observed that constitutional courts must defer to the understanding and appreciation of the author 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. The relevant paragraphs of the said Judgement iterating the same is as under:

“14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a)

of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

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.”

20. In Silippi Constructions Contractors v. Union of India, **2019 SCC OnLine SC 1133**, the Supreme Court, while discussing the aspect of judicial intervention in matters of contract involving state instrumentalities had held that the authority which floats the contract or tender, and has authored the tender documents is the best judge regarding interpretation of the same. Any interference by the Court has to be for the purposes of preventing arbitrariness, irrationality, bias, *mala fides* or perversity. In paragraph 20 of the said Judgement, the Supreme Court observed as follows:

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

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

*25. That brings us to the most contentious issue as to whether the learned Single Judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. **We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution.** These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. Respondents 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done.”* (emphasis supplied)

21. The Apex Court in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, after relying on various judgments has observed as under:-

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the

State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

22. Ultimately in a number of Judgments, the Apex Court has held that that the Courts before interfering in tender or contractual matters, in exercise of its power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted, or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226 of the Constitution of India (Refer: Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517 and Michigan Rubber (India) Ltd (Supra))

23. Apropos the arguments regarding the applicability of the rule of *contra proferentum* in tender matters, the law has been settled by the Apex Court in M/s Agmatel India Pvt. Ltd. vs. M/s Resoursys Telecom and Ors., (2022) 5 SCC 362 wherein the Apex Court has held as under:

"36. The same aspects apply to the observations regarding "contra proferentem rule" as referred by the High Court with reference to United India Insurance [United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd., (2016) 3 SCC 49 : (2016) 2 SCC (Civ) 14]. The said rule was referred by this Court while not accepting the argument made on behalf of the insured and while observing that the said rule had no application, when the language of the relevant clauses was plain, clear and unambiguous. We may, however, observe that even from the extracted part of the principles related with the "contra proferentem rule", as reproduced by this Court from the Halsbury's Laws of England, it is clear that the

said rule was applied in the case of ambiguity in the insurance policy because the policies are made by the insurer and its ambiguity cannot be allowed to operate against the insured. This rule, in our view, cannot be applied to lay down that in case of any ambiguity in a tender document, it has to be construed in favour of a particular person who projects a particular viewpoint. The obvious inapplicability of this doctrine to the eligibility conditions in a notice inviting tender could be visualised from a simple fact that in case of ambiguity, if two different tenderers suggest two different interpretations, the question would always remain as to which of the two interpretation is to be accepted? Obviously, to avoid such unworkable scenarios, the principle is that the author of the tender document is the best person to interpret its documents and requirements. The only requirement of law, for such process of decision-making by the tender inviting authority, is that it should not be suffering from illegality, irrationality, mala fides, perversity, or procedural impropriety. No such case being made out, the decision of the tender inviting authority (NVS) in the present case was not required to be interfered with on the reasoning that according to the writ court, the product "smartphone" ought to be taken as being of similar category as the product "Tablet". "

23. In view of the above, the Apex Court has categorically held that the Rule of *contra preferentum* shall not apply in tender matters for the reason that it is for the tenderer to decide as to who would be the best suitable bidder for award of the tender and unless the decision-making process is completely arbitrary and has been design only to favour some person or is accentuated by malafide, the Courts should not interfere under Article 226 of the Constitution of India.

24. A perusal of the reasoning contained in the Final Evaluation Report indicates proper application of mind by the Financial Consultant. It cannot be

said that the opinion of the Financial Consultant is so arbitrary that it would warrant interference by this Court under Article 226 of the Constitution of India. The contention of the learned Counsel for the Appellant, that restricting the reserves only to reserves arising out of revenue profit will have a disastrous effect on the Appellant company inasmuch as it cannot apply for the tenders floated by the NHAI and that this will go against the spirit of the orders passed by the NCLT reviving the company, cannot be accepted. In the present tender, the Respondent has fixed a minimum net worth (financial capacity) of Rs.42.98 Crores. It is always open for the Appellant herein to apply for projects floated by the NHAI in which the minimum net worth prescribed is less than Rs.42.98 Crores.

25. The present case deals with a very important infrastructure activity under the Bharatmala Pariyojana which is a prestigious project of the Government of India. The financial capacity of the bidder is an important factor which has to be kept in mind by the tendering authority in order to decide as to whom the tender should be awarded, and therefore, the decision of the tendering authority to restrict the reserves only to reserves arising out of revenue profits cannot be found fault with and the same cannot be held to be so arbitrary and unreasonable that this Court should exercise its jurisdiction under Article 226 of the Constitution of India and interfere in the award of tender. This Court does not find any merit in the petition.

26. The petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

DECEMBER 19, 2022/S. Zakir