

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

Date of decision: 23rd NOVEMBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 15273/2022 & CM APPLs.47349-50/2022**

KUMAR INFRATRADE ENTERPRISES PRIVATE LIMITED

..... Petitioner

Through: Mr. Ajit Kumar Sinha, Senior Advocate with Mr. Neeraj K. Gupta, Mr. Ranjeet Kumar Singh, Mr. Akshaya Agarwal, Mr. Shrijan Sinha, Ms. Parul Dhruvy & Mr. Sivang Srivastava, Advocates.

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LIMITED & ORS. Respondents

Through: Mr. Harshit Agarwal & Mr. Aasheesh Gupta, Advocates for Respondent/IRCTC.
Mr. Vikram Jetley, CGSC with Ms. Shreya Jetley & Mr. Kaushal Kait, Advocates for Respondent No.3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant writ petition has been filed under Articles 226/227 of the Constitution of India seeking the quashing of the communication dated 20.10.2022 issued by Indian Railway Catering and Tourism Corporation Limited ("IRCTC") whereby the bid of the Petitioner for Tender No. 2022/IRCTC/BNR/RANCHI and PURI was disqualified.

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

- a) It is stated that the Petitioner-Company, which deals with construction, building, carrying on of businesses of hotels, malls and other ancillary services, commenced its business of operating a hotel by the name of “Lemon Tree Premier” at Patna in the year 2017.
- b) In July 2022, IRCTC issued Open E-Tender No. 2022/IRCTC/BNR/RANCHI and PURI for re-developing, operating, maintaining and transfer (ROMT) of BNR-Hotel, Ranchi. Rs. 13,00,000/- was to be paid as the Earnest Deposit Money (EMD), and the last date and time of Online Submission of Bid was 11.08.2022 upto 15:00 hrs.
- c) The tender document in question by way of Clause 4 titled “Minimum Eligibility Criteria” stipulates the following requirements, *inter alia*, that must be fulfilled on the part of the entity seeking to submit its bid:

“4. MINIMUM ELIGIBILITY CRITERIA

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SN	Basic Requirement	Specific Requirement	Documents Required
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2.	Aggregate Turnover	The bidder should have a minimum aggregate	• Bidder is required to upload Audited Balance Sheet and Profit & Loss

		turnover of INR 33 Cr. from the business of operating and maintaining Hotel (s) in any three (03) financial years of the previous five (05) financial years i.e, 2016- 17, 2017-18, 2018-19, 2019-20 & 2020-21 The turnover of the bidder should not be NIL (Zero) in any of the five (05) Financial years as above. (The turnover here means turnover from	Account for all financial years i.e, financial years i.e, 2016-17, 2017-18, 2018-19, 2019-20 & 2020- 21. And Bidders are required to upload "Certificate for breakup of Annual turnover" as per Annexure 8 issued by Statutory auditor /Chartered Accountant, clearly specifying the Annual turnovers of the Bidder for all financial years. The "CERTIFICATE FOR BREAKUP OF SALES" uploaded by the
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		room rent, food & beverages and from other services provided to the guests by the Hotel like banquets, conferences, telephone, travel desk etc.)	bidder must bear UDIN.
3.	Similar Work Experience	1. Bidder must have One (01) Operational Hotel having at least inventory of 50 rooms along with Food & Beverage facility. Or 2. Bidder must have one operational	Bidder is required to upload valid FSSAI license towards certification of the Food & Beverage facility in the hotel and any one (01) valid certificate issued in the name of Hotel towards certification that the hotel has at least inventory of 50 rooms.

		Hotel having valid minimum Two (02) star certification (issued by Ministry of Tourism, State tourism or any Authorized body under Govt of India/State).	1) Fire Safety Certificate/ 2) Valid Star Classification Certificate/ 3) License to keep a place of public entertainment issued by State Police (Licensing Department)/ 4) Certificate issued by Competent Govt Official certifying/mentioning the number of rooms in hotel. Bidder is required to upload valid FSSAI license towards certification of the Food & Beverage facility in the hotel and valid Star Classification certification (issued
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			by Ministry of Tourism, State tourism or any Authorized body under Govt of India/State) towards two (02) star certification of the hotel.
4.	Net Worth	Bidder should have a net worth of 2 Crore as on March 31, 2022.	Bidder is required to upload Certificate issued by Chartered Accountant The uploaded certificate must have UDIN.

- d) Therefore, with regard to Aggregate Turnover, it was stated that the bidder is required to have a minimum aggregate turnover of Rs. 33 crores from the business of operating and maintaining hotel(s) in any three financial years of the previous five financial years ("FY"), i.e. 2016-2017, 2017-2018, 2018-2019, 2019-2020 and 2020-2021. It was further stated that the turnover should not be *nil* in any of the five FYs. Clause 4 further notes *"non-submission of any of the documents listed in "MINIMUM ELIGIBILITY CRITERIA" mentioned above, shall lead to summarily rejection of the offer. No further correspondence in this regard will be made. Bidders shall also submit Annexures"*.

- e) Thereafter, Corrigendum-01 dated 29.07.2022 was issued whereby the following revisions were made:

2.	Aggregate Turn over	The bidder should have a minimum aggregate turnover in INR 33 Cr. from the business of operating and maintaining Hotel (s) in any three (03) financial years of the previous five (05) financial years i.e., 2016-17, 2017-18, 2018-19, 2019-20 & 2020-21. OR 2017-18, 2018-19, 2019-20, 2020-21 & 2021-22. The turnover of the bidder should not be NIL (Zero) in any of the five (05) Financial years as above. (The turnover here	• Bidder is required to upload Audited Balance Sheet and Profit and Loss Account for all financial years, i.e. either in five (05) financial years 2016-17, 2017-18, 2018-19, 2019-20 & 2020-21 Or in the five (05) financial years 2017-18, 2018-19, 2019-20, 2020-21 & 2021-22. And Bidders are required to upload
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		means turnover from room rent, food & beverages and from other services provided to the guests by the Hotel like banquets, conferences, telephone, travel desk etc.)	"Certificate for breakup of Annual Turnover" as per Annexure 8 issued by Statutory auditor/Chartered Accountant, clearly specifying the Annual turnovers of the Bidder for all financial years. The "CERTIFICATE FOR BREAKUP OF SALES" uploaded by the bidder <u>must bear UDIN.</u>
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As per the Corrigendum, the bidder is required to have a minimum aggregate turnover Rs. 33 crores from the business of operating and maintaining hotel(s) in any three financial years of the previous five financial years, i.e. 2016-2017, 2017-2018, 2018-2019, 2019-2020 and 2020-2021 OR 2017-2018,

2018-2019, 2019-2020, 2020-2021 and 2021-2022. The revised date and time for submission of tender was 17.08.2022. Subsequently, Corrigendum-02 dated 03.08.2022 was issued as per which the date and time for submission and opening of e-tender was extended to 07.09.2022.

- f) It is stated that the Petitioner, in accordance with Annexure 8 (Certificate for Break-Up of Sales) of the tender document, uploaded its break-up of annual turnover for the FYs 2016-2017, 2017-2018, 2018-2019, 2019-2020, and 2020-2021. It is stated that the aggregate sale turnover of the Petitioner was Rs. 82,18,23,527/- and the break-up of the same was as follows:

Financial Year	Break-up of Annual turnover (in INR)						Total Annual Turnover (INR)
	Room Rent Sales	Food & Beverage Sales	Banquet Conference Sales	Travel Desk Sales	Telephone and Internet Café Sales	Other Sales (please specify)	
2016-17	-	-	-	-	-	-	-
2017-18	4,05,18,157	79,12,787	4,03,14,743	2,31,963	56,124	65,36,170	9,55,69,944
2018-19	13,21,41,203	2,34,93,020	10,17,84,364	12,04,346	1,29,721	1,50,00,147	27,37,52,801
2019-20	13,96,75,192	2,50,63,092	12,85,35,355	20,40,179	95,421	1,64,93,710	31,19,02,999
2020-21	7,13,33,802	1,08,74,266	5,07,85,629	33,27,940	87,925	42,38,223	14,05,97,784
Total Aggregate turnover (INR) for 2016-17, 2017-18, 2018-19, 2019-20 & 2020-21							82,18,23,527

- g) It is stated that the Petitioner filed its audited financial statement for the FY 2021-2022 and the same met the eligibility criteria as stipulated in the tender document. It is stated that, however, at the time of submission, the Petitioner could not file audited balance sheet for the FY 2021-2022 could not be filed as the last

date of acknowledgement as per the Income Tax Department was 30.09.2022. The bid of the Petitioner was submitted on 06.09.2022-07.09.2022.

- h) It is stated that by way of Corrigendum-05, the date and time for submission of the e-tender was extended to 22.09.2022 till 15:00 hrs. It is stated that on 22.09.2022, IRCTC declared the results for the technical bid with the status of the Petitioner being “In The Race”. However, it is stated that *vide* impugned Communication dated 20.10.2022, the Petitioner was disqualified for having submitted the Audited Balance Sheet and Profit and Loss Account for five financial years, with the turnover for the financial year 2016-2017 being nil.
- i) In response to the impugned Communication, the Petitioner *vide* letter dated 21.10.2022, requested IRCTC to consider its audited balance sheet for the FY 2021-2022 as well as the acknowledgement dated 30.09.2022 generated by the Income Tax Department which would be in consonance with Corrigendum-01 dated 29.07.2022.
- j) Aggrieved by the impugned Communication dated 20.10.2022 issued by IRCTC and seeking directions to IRCTC to consider the Petitioner’s audited financial statement of the FY 2021-2022, the Petitioner has approached this Court by way of the instant writ petition.

3. Mr. Ajit Kumar Sinha, learned Senior Counsel appearing for the Petitioner, submits at the outset that the audited financial statements submitted by the Petitioner were in accordance with Annexure-8 of the tender document. He states that the tender document initially noted that statements

of the FYs 2016-2017, 2017-2018, 2018-2019, 2019-2020 and 2020-2021 were to be provided. As the Petitioner had commenced its business in the year 2017, the turnover for the FY 2016-2017 was nil. However, Mr. Sinha argues, as Corrigendum-01 dated 29.07.2022 provided the option for the statements of the FY 2021-2022 to be included as well, the Petitioner had consequently filed its audited financial statement for the FY 2021-2022.

4. The learned Senior Counsel submits that with the filing of audited financial statement for the FY 2021-2022, the statement for the year 2016-2017 should have been disregarded, and that IRCTC's disqualification of the Petitioner on the sole basis of the fact that the statement of the Petitioner for the FY 2016-2017 showcased nil was *mala fide*. He relies upon the result dated 22.09.2022 issued by IRCTC which indicates that the EMD of the Petitioner had been received and that the status of the Petitioner was that it was "In The Race". Mr. Sinha argues that once IRCTC has announced that the Petitioner is in the race, i.e. qualified and not disqualified, then IRCTC is estopped from issuing a communication unilaterally disqualifying the Petitioner. He states that legitimate expectation had accrued in favour of the Petitioner by way of the result dated 22.09.2022.

5. Mr. Sinha for the Petitioner further submits that the decision taken by IRCTC reeks of *mala fide*, arbitrariness, and unreasonableness, and therefore, as per settled law, this Court retains its jurisdiction to intervene in the instant matter. The learned Senior Counsel cites Poddar Steel Corporation v. Ganesh Engineering Works and Ors., (1991) 3 SCC 273, to submit that minor technical irregularities can be waived if the condition that is to be deviated from is non-essential in nature or an ancillary/subsidiary requirement. He further relies on Rashmi Metaliks Limited and Anr. v. Kolkata Metropolitan Development Authority and Ors., (2013) 10 SCC 95, to argue that the

Supreme Court had allowed the appeal of the Petitioner-bidder therein against its disqualification for failing to submit its income tax return on the ground that the requirement for income tax return did not assume an essential character.

6. *Per contra*, Mr. Harshit Agarwal, learned Counsel for the IRCTC, submits that the tender in question had been floated on www.tenderwizard.com which allowed for day-to-day updates to be issued to the bidders, including notices, corrigenda, etc. Any change made to the tender document would be intimated to the registered bidders via a system generated email. He states that the initial unchanged tender document enumerated certain requirements pertaining to the annual turnover of the bidder.

7. Mr. Agarwal submits that a pre-bid meeting had been organised on 26.07.2022, however, the Petitioner had raised no issues or queries with regard to the prescribed minimum eligibility criteria. Thereafter, Corrigendum-01 dated 29.07.2022 was issued which revised the tender document and stipulated another option that could be exercised by the bidder to showcase its annual turnover. However, when a Road Show-cum-pre-bid meeting was held on 04.08.2022, the Petitioner did not present any query with regard to the minimum eligibility criteria, despite being aware of the fact that the same stood revised. Mr. Agarwal further states that 30.09.2022 was the last date for filing of balance sheet for the FY 2021-2022 and that nothing had prevented the Petitioner from doing so at an earlier date.

8. The Counsel for IRCTC argues that a perusal of the documents submitted by the Petitioner reveals that the tax audit had been completed on 05.09.2022 and that the balance sheet for the FY 2021-2022 had been signed by the Board on 05.09.2022 itself. He states that the Petitioner is misleading the Court by alleging that the Income Tax Return had been filed on

30.09.2022 only when, in fact, what was required to be filed was the audited balance sheet for the FY 2021-2022 that had been available to the Petitioner prior to the date of submission of bid, i.e. 06.09.2022. He states that the Petitioner particularly submitted its bid as per Option 1 and not Option 2.

9. The learned Counsel appearing for IRCTC submits that being classified as “In The Race” does not inhere a vested right of qualification for the financial bid in the Petitioner. He states that it simply implies that the Tender Opening Committee had conducted its evaluation with regard to the existence of the required documents and the deposit of the EMD, however, no scrutiny of the documents in question had taken place by the Tender Screening Committee and the Tender Evaluation Committee. He states that thereafter, the process of downloading and printing of the documents, as well as the preparation of the report commenced on 22.09.2022 and concluded on 07.10.2022, and the documents were then sent by the Tender Screening Committee to the Tender Evaluation Committee for a strict scrutiny of the documents submitted.

10. The learned Counsel submits that the Petitioner willingly and knowingly did not exercise Option-2, and that they were aware that their turnover for the FY 2016-2017 was nil which entailed disqualification. He argues that the aim of the Petitioner is to only scuttle the entire tender process, and that a response was issued to the letter dated 21.10.2022 by way of letter dated 04.11.2022 wherein IRCTC examined the request of the Petitioner and provided reasons for rejecting the same.

11. Mr. Agarwal, in conclusion, relies upon N.G. Projects Limited v. Vinod Kumar Jain and Ors., (2022) 6 SCC 127, to submit that the scope of interference in tender matters is limited, and that just because the view of the Technical Evaluation Committee is not to the liking of the Petitioner, it would

not warrant for interference in a grant of contract to a successful bidder. Further reliance has been placed on a judgement dated 16.10.2020 of this Court in E-Netspider India v. Union of India and Anr., **W.P.(C) 7955/2020**, to state that a person who participates in a tender cannot turn around and challenge the clauses of the very same tender.

12. Heard Mr. Ajit Kumar Sinha, learned Senior Counsel appearing for the Petitioner, Mr. Harshit Agarwal, learned Counsel appearing for IRCTC, and perused the material on record.

13. Before we delve into whether Courts can intervene in contractual matters, it would be prudent to briefly recall the relevant clauses of Tender No.: 2022/IRCTC/BNR/RANCHI and PURI authored by IRCTC that govern the instant matter. Clause 4 of the tender document stipulates the minimum eligibility criteria as per which the bidder is required to possess a minimum aggregate turnover of Rs. 33 crores from the business of operating and maintaining hotel(s) in any three financial years of the previous five financial years, i.e. 2016-2017, 2017-2018, 2018-2019, 2019-2020, and 2020-2021(*hereinafter referred to as “Option 1”*). This requirement was revised *vide* Corrigendum-01 dated 29.07.2022 which, in addition to Option 1, allowed the bidder to provide its financial statements for the financial years 2017-2018, 2018-2019, 2019-2020, 2020-2021 and 2021-2022 (*hereinafter referred to as “Option 2”*). The one constant in this requirement was that the turnover of the bidder could not be nil (zero) in any of the five financial years. Point No.3 under Note of Clause 4 categorically notes that non-submission of any of the documents listed in the ‘minimum eligibility criteria’ would lead to the summary rejection of the offer with no further correspondence being made in this regard.

14. In the instant matter, in accordance with Annexure 8 of the tender document which provides the format for the certificate of break-up of annual turnover that must be submitted to prove that one satisfies the minimum eligibility criteria with respect to their annual turnover, the Petitioner submitted the same which has been reproduced hereinabove. A perusal of this break-up of annual turnover submitted by the Petitioner explicitly notes that though the aggregate sale turnover of the Petitioner is Rs. 82,18,23,527/-, the annual turnover of the Petitioner for the FY 2016-2017 is nil. It is the contention of the Petitioner that, with the issuance of Corrigendum-01 dated 29.07.2022, the Petitioner had the option of submitting its financial statement for FY 2021-2022, however, the same could not be filed as last date of acknowledgement as per the Income Tax Department was 30.09.2022 and the bid of the Petitioner had been submitted on 06.09.2022-07.09.2022. It has further been stated that *vide* Corrigendum-05, the date and time for submission of e-tender was extended to 22.09.2022. In summary, the Petitioner has contended that their request for their financial statements for FY 2021-2022 should be considered in consonance with the revised minimum eligibility requirements.

15. This Court, at the outset, is of the opinion that the arguments advanced by the Petitioner do not hold any water and are liable to be dismissed. The “annual turnover” aspect of Clause 4: Minimum Eligibility Criteria, duly amended by Corrigendum-01 dated 29.07.2022, provides two options to all bidders to showcase their annual turnover. The requirement that remains constant even after amendment is that the turnover for any financial year cannot be nil under any circumstances. However, a bare glance through the Annual Turnover Certificate dated 31.08.2022 submitted by the Petitioner

indicates that the Petitioner has exercised Option 1 and the annual turnover for the FY 2016-2017 is nil. This is an undisputed fact.

16. If the party issuing the tender is punctiliously and rigidly enforcing conditions and stipulations in a tender document, and the bidder does not strictly comply with the requirements, then it is open to the party issuing the tender to decline consideration of a part for the contract [Refer to G.J. Fernandez v. State of Karnataka and Ors., (1990) 2 SCC 488]. The relevant paragraphs in the Judgement delineating the said observations are reproduced as under:

“13. Interesting as this argument is, we do not see much force in it. In the first place, although, as we have explained above, para V cannot but be read with para I and that the supply of some of the documents referred to in para V is indispensable to assess whether the applicant fulfils the pre-qualifying requirements set out in para I, it will be too extreme to hold that the omission to supply every small detail referred to in para V would affect the eligibility under para I and disqualify the tenderer. The question how far the delayed supply, or omission to supply, any one or more of the details referred to therein will affect any of the pre-qualifying conditions is a matter which it is for the KPC to assess. We have seen that the documents having a direct bearing on para I viz. regarding output of concrete and brick work had been supplied in time. The delay was only in supplying the details regarding “hollow cement blocks” and to what extent this lacuna affected the conditions in para I was for the KPC to assess. The minutes relied upon show that, after getting a clarification from the General Manager (Technical), the conclusion was reached that “the use of cement hollow block masonry may not be required at all and instead the brick masonry may be used”. In other words, the contract was unlikely to need any work in hollow cement blocks and so the document in question

was considered to be of no importance in judging the pre-qualifying requirements. There is nothing wrong with this, particularly as this document was eventually supplied.

14. Secondly, whatever may be the interpretation that a court may place on the NIT, the way in which the tender documents issued by it has been understood and implemented by the KPC is explained in its “note”, which sets out the general procedure which the KPC was following in regard to NITs issued by it from time to time. Para 2.00 of the “note” makes it clear that the KPC took the view that para I alone incorporated the “minimum pre-qualifying/eligibility conditions” and the data called for under para V was in the nature “general requirements”. It further clarifies that while tenders will be issued only to those who comply with the pre-qualifying conditions, any deficiency in the general requirements will not disqualify the applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract, but, on the contrary, decided to adhere to it even in regard to this contract. They only decided, in view of the contentions raised by the appellant that para V should also be treated as part of the pre-qualifying conditions, that they would make it specific and clear in their future NITs that only the fulfilment of pre-qualifying conditions would be mandatory. If a party has been consistently and bona fide interpreting the standards prescribed by it in a particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Shri Vaidyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to court with any such grievance. The question, then, is

whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana case [(1990) 2 SCC 486] will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the courts. We were, therefore, rightly not called upon to go into this question.”

17. The Supreme Court has consistently observed that essential clauses of a tender should be enforced strictly and that no deviation is permissible under the law. In Poddar Steel Corporation v. Ganesh Engineering Works and Ors. (supra), the Supreme Court noted that requirements in a tender notice can be classified into two categories – those which lay down the essential conditions

of eligibility and those which are merely ancillary or subsidiary with the main object to be achieved by the condition. The relevant paragraph stating the same has been reproduced as under:

“6. The principal argument advanced on behalf of the petitioner is that paragraphs I and V of the NIT specified certain pre-qualifying requirements. Unless these requirements were fulfilled, the contractor was not even entitled to be supplied with a set of tender documents. It is submitted that MCC did not comply with these requirements and hence its application for tender forms should have been rejected at the outset.”

18. Taking the aforementioned judicial pronouncements into consideration, the Petitioner's contention that the deviation on the part of the Petitioner was a minor technical irregularity cannot be countenanced as the condition was essential in nature. Clause 4 of the tender document notes, without any exceptions, that the financial statement of the Petitioner for any financial year should not show nil. Moreover, the Petitioner was required to exercise either Option 1 or Option 2. In these circumstances, the Petitioner, who exercised Option 1 at the first instance, cannot request for an opportunity to exercise Option 2 at a later instance. It cannot seek exemptions from application of the said clause when it is applicable to every other entity bidding for the tender. Moreover, even if the Petitioner had exercised Option 2, there was nothing cogent that prevented the Petitioner from providing its statement for the Financial Year 2021-22 before the submission of its bid. Furthermore, it is not the case of the Petitioner that the conditions have been devised in such a way to favour a particular bidder or that the tender conditions must be assailed. They are applicable to every bidder across the board.

19. In fact, the Supreme Court in Meerut Development Authority v. Association of Management Studies, (2009) 6 SCC 171, had remarked that bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of bids. Further, it was noted that no bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of the tender document provided for such negotiations. The relevant portion of the said Judgement delineating is as follows:

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

20. Flowing from the above, it is reiterated that as the Petitioner had already exercised Option 1 while submitting its certificate of break-up of annual turnover which included its financial statement for the FY 2016-2017. The Petitioner, having once exercised its Option 1, cannot at a later stage seek for an opportunity to exercise Option 2. Allowing this discretion to the Petitioner would entail placing other bidders on an unequal plane and according special treatment to the Petitioner. As has been submitted in the Counter Affidavit of IRCTC, multiple pre-bid meetings had been conducted by IRCTC for addressing clarifications and queries of the bidders. Had the Petitioner faced any confusion with regard to the submission of its annual turnover statements of which it was aware, the Petitioner could have posed its queries during the course of these pre-bid meetings.

21. Additionally, the learned Senior Counsel appearing for the Petitioner has relied upon result dated 22.09.2022 published by IRCTC wherein the status of the Petitioner is noted as “In The Race”. It has been contended that “In The Race” denotes that the Petitioner was qualified for the financial bid, and therefore, IRCTC cannot now turn around and disqualify the Petitioner. This submission of the Petitioner does not hold any merit in the eyes of this Court.

22. The Counter Affidavit on behalf of IRCTC is on record and the process for evaluation of a technical bid has been comprehensively described. The portion of the Counter Affidavit demonstrating the same has been reproduced as under for ease of comprehension:

“15. At this juncture, it is relevant to set out the process of technical bid and the same is as under:

a) The tender was floated online through the portal of www.tenderrwizard.com and bids in this

case were called under the two –part bid system. Part A Technical and Part-B Financial. The bidders submit their bids in two parts online.

b) Since, the tender was floated online through the portal of www.tenderrwizard.com, the technical bids are opened online by the Tender the Tender Opening Committee by affixing its digital signatures. At stage, what is verified online and through the auto mode/software is whether the bidder has uploaded the documents and Earnest Money Deposit (EMD) or not and nothing further is done. At that stage the documents are not checked. The Tender Opening Committee opens the technical bids on the date and time specified. In fact, the documents uploaded by the bidder on the portal of tenderwizard.com are not even downloaded by the Tender Opening Committee. The bidder whose bids are successfully submitted on the portal are classified to be ‘in the race’ subject to scrutiny of documents and evaluation of bid documents/bid by the Screening Committee and therefore by Tender Evaluation Committee. Therefore, the phrase ‘in the race’ only signifies that the bidder had complied in filing of documents and EMD and is eligible for evaluation of its technical bid documents by the Screening Committee and thereafter by Tender Evaluation Committee.

(c) Perusal of Annexure- P8 filed by the petitioner confirms the above position in as much as the “status” of every bidder who had uploaded the documents and deposited EMD was declared to be ‘in the race’. However, those bidders who had either failed to submit the form or had withdrawn their bid were disqualified automatically with the remarks “disqualified-Auto” on the opening of bid by the Tender Opening Committee. Therefore, the portal will

only auto check whether the bidder has uploaded the documents and deposited/submitted Earnest Money Deposit (EMD).

(d) Thereafter, the documents are downloaded and printed by the screening committee of IRCTD. In the present case, the process of downloading and printing of documents and preparation of report on the same by the screening committee commenced on 22.09.2022 and concluded on 07.10.2022. The Screening committee thereafter sent the documents of bidders alongwith the report of the Tender Evaluation Committee who then further scrutinize the documents and also peruse the report.

(e) The Tender Evaluation Committee carry out detailed scrutiny and study of the documents filed by the bidder to verify whether the documents filed by the bidder are in conformity with the minimum eligibility criteria and terms and conditions set out in the tender. Therefore, it is at this stage that documents are studied by the said committee and only then it can be ascertained if the bidder meets the minimum eligibility criteria. It is only thereafter that the Tender Evaluation Committee forms a final opinion and declare as to whether the technical bid of the bidder has qualified or not. The Tender Evaluation Committee concluded scrutiny of documents on 20.10.2022.

(f) The aforesaid procedure has been adopted by the respondent to ensure full proof scrutiny of technical bid and give fair and equal treatment to all bidders. This process cannot conclude immediately on the opening day of technical bid at a click of a button and is tedious exercise which entails time and effort.”

23. A reading of the aforementioned portion reveals that there are three committees, i.e. Tender Opening Committee, Tender Screening Committee and the Tender Evaluation Committee. The Tender Opening Committee merely opens the technical bids on the date and time specified without even downloading the documents. The bids which are successfully submitted on the portal are classified to be “*in the race*”, and then these bids are subjected to scrutiny by the Tender Screening Committee and thereafter the Tender Evaluation Committee. The phrase “*in the race*” merely signifies that bidder has complied with the filing of documents and the EMD, and thus, is eligible for evaluation by the other two committees. Those who have failed to submit the form, EMD or have withdrawn their bid are disqualified automatically with the remarks “*Disqualified-Auto*”. The documents are then downloaded and printed by the Tender Screening Committee with a report being prepared on the same, and then the documents are sent to the Tender Evaluation Committee who then further scrutinize the documents and peruse the report of the Tender Screening Committee. This Tender Evaluation Committee, after conducting a detailed study of the documents and ascertaining whether the minimum eligibility criteria has been satisfied by the bidder, forms a final opinion with regard to the qualification of the bidder.

24. In the instant case, the result dated 22.09.2022 merely portrayed that the documents of the Petitioner, along with the EMD, had been submitted. The Tender Screening Committee then downloaded and printed the documents as well as prepared a report; the process commenced on 22.09.2022 and concluded on 07.10.2022. Thereafter, having studied the documents, the final opinion of the Tender Evaluation Committee was rendered *vide* impugned Communication dated 20.10.2022. While it is settled

law that failure to consider and give due weight to the mere reasonable or legitimate expectation may render a decision arbitrary, however, this legitimate expectation is not, by itself, a distinct enforceable right. Further, whether or not the expectation of the claimant is reasonable or legitimate is a question of fact in each case [Refer to Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71]. In the instant case, as has been discussed hereinabove, the facts and circumstances reveal that no expectation, let alone a right, had accrued in favour of the Petitioner. The reliance of the Petitioner on the result dated 22.09.2022 is misplaced as by no stretch of imagination can the inference be drawn that the Petitioner had qualified for the financial bid.

25. Having arrived at the conclusion that the decision of IRCTC to disqualify the Petitioner on grounds of non-compliance with the minimum eligibility criteria was not arbitrary and that the Petitioner had no legitimate expectation to qualification for the financial bid, this Court deems it appropriate to delve into whether this Court can exercise its power of judicial review in the instant. It has been consistently observed by the Supreme Court that the scope of intervention in matters of this nature is extremely limited, and that Courts may only interfere in an administrative decision if, and only if, the same is arbitrary, irrational, unreasonable, *mala fide* or biased. In the absence of these situations, Courts must not countenance interference with the decision merely at the behest of an unsuccessful bidder.

26. The aforementioned observed was made by the Supreme Court in the case of Tata Cellular v. Union of India, (1994) 6 SCC 651, and the relevant portion of the judgement delineating the same has been reproduced as follows:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In Chief Constable of the North Wales Police v. Evans [(1982) 3 All ER 141, 154] Lord Brightman said:

“Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160).”

In R. v. Panel on Take-overs and Mergers, ex p Datafin plc [(1987) 1 All ER 564] , Sir John Donaldson, M.R. commented:

“An application for judicial review is not an appeal.”

In Lonrho plc v. Secretary of State for Trade and Industry [(1989) 2 All ER 609] , Lord Keith said:

“Judicial review is a protection and not a weapon.”

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In Amin, Re [Amin v. Entry Clearance Officer, (1983) 2 All ER 864] , Lord Fraser observed that:

“Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.””

27. The Supreme Court has further held that power of judicial review should not be permitted to be invoked to protect private interests at the cost of public interest, or to decide contractual disputes. This was observed by the Supreme Court in the Central Coalfields Limited and Anr. v. SLL-SML (Joint Venture Consortium) and Ors., (2016) 8 SCC 622. The paragraphs of the said Judgement stating the aforementioned is as under:

“43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in Tata Cellular v. Union of India [Tata Cellular v. Union of

India, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]) in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make

mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. 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.”

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , SCC p. 531, para 22)

“22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

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

or

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

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

28. The aforesaid judicial pronouncements portray that the scope of interference by way of judicial review in tender matters is extremely limited,

and can only be justified if done to rectify patent arbitrariness, unreasonableness, *mala fides*, or bias, in the administrative decision. In the absence of the same, Courts must stay its hands and should not interfere, even if a procedural aberration or error in assessment or prejudice to the tenderer is made out. In the matter herein, there is explicit non-compliance on the part of the Petitioner of the minimum eligibility criteria as has been set in Clause 4 of the tender document. The Petitioner was categorically required to exercise either Option 1 or Option 2 while submitting its certificate of break-up of turnover. Having exercised Option 1 and demonstrated its financial statement for the FY 2016-2017 as nil which was prohibited as per the Clause, the Petitioner cannot at this juncture seek for its statement for the FY 2021-2022 to be considered instead, and thereby, be given special treatment by IRCTC. Even assuming that the Petitioner had resorted to Option No.2, there was nothing which prohibited the Petitioner to file an audited balance sheet for the Financial Year 2021-22 which was available with the Petitioner prior to the date of submission of bid, i.e. 06.09.2022, and the same is evident from the documents filed in the Court. We find force in the submission of the learned Counsel for the IRCTC in this regard.

29. In light of the foregoing, this Court refuses to exercise its jurisdiction under Article 226 of the Constitution in the instant matter. Accordingly, the petition is dismissed, along with the pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

NOVEMBER 23, 2022/Rahul