

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

Date of decision: 22nd December, 2022

IN THE MATTER OF:

+ **W.P.(C) 15749/2022 & CM APPL. 49021/2022**

DYNAMIC DRILLING AND SERVICES PRIVATE LIMITED

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Neeraj Sharma, Ms.
Archana Lakhotia, Mr. Bikram
Bhattacharya, Advocates

versus

OIL AND NATURAL GAS CORPORATION LIMITED

..... Respondent

Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr. Abhishek Gupta,
Ms. Ikshita Singh, Mr. Dishant Bhati,
Ms. Tanya, Mr. Aayush Singhal,
Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The Petitioner before this Court has filed the present writ petition seeking to quash any decision purported to have been taken by the Respondent herein to disqualify the Petitioner's techno-commercial bid dated 29.09.2022 for the Tender issued by the Respondent being Tender No. MR/DS/MM (CH)/12 JU Rigs/2022/P46JC22005 dated 26.07.2022 (*hereinafter referred to as 'the Impugned Tender'*).

2. The Petitioner claims that it is a well-known offshore drilling rigs operator in India and has previously operated six offshore Jackup Rigs and

one Drillship in India for long term contracts with the Respondent herein. It is stated that the Petitioner's Rig, *Valiant Driller*, (*hereinafter referred to as "the Rig"*) was awarded a contract in 2018, being Contract No. MR/DS/MM(CH)/8 RIGS/2017/P46JC17001/9010026434 dated 26.03.2018 (*hereinafter referred to as 'the 2018 Tender'*) for a period of three years commencing from 08.10.2018. It is stated that while the Rig of the Petitioner was operating for the Respondent under the 2018 Tender, the Respondent herein issued another tender on 21.12.2020, being Tender No. MR/WS/MM (CH)/2020/P66JC20001 (*hereinafter referred to as 'the 2020 Tender'*), for a Charter Hire of two Drilling Work over Rigs and the Petitioner offered the Rig for hire to the Respondent herein. It is stated by the Petitioner that the Bid Evaluation Criteria and the Technical Qualifications under the 2020 Tender are identical to the Impugned Tender.

3. It is stated that on 17.05.2021, while the Rig was operating under the 2018 Contract, it got caught in the eye of the Super Cyclone '*Tauktae*' and suffered damage due to the impact of the Cyclone and was rendered incapable of continuing operations. As a consequence of the damage suffered by the Rig, the contract was terminated on 05.08.2022 with effect from 17.05.2021.

4. It is pertinent to mention at this juncture that since the Petitioner had also submitted a bid for the 2020 Tender, the Respondent herein wrote a letter to the Petitioner dated 12.06.2021, seeking details of the equipment on the Rig that have suffered damage due to the Super Cyclone '*Tauktae*', latest status of major repair jobs already completed after the Cyclone, the timeline for removing debris from the sea bed and moving the rig out of Respondent's location. The Respondent also sought a feasibility report duly approved from the Classification Agency stating that the Rig can be

modified/upgraded/re-activated so it can be available for inspection. The Petitioner gave a reply to the aforesaid letter of the Respondent *vide* letter dated 23.06.2021 giving details sought for by the Respondent along with the feasibility report as requested.

5. It is stated that on 26.07.2022, the Respondent issued the Impugned Tender inviting fresh bids for Charter Hire of 12 Jack up Drilling rigs for a period of three years for three categories, namely:

- 1) Category-I: MLT/BMC Design for Drilling Section
- 2) Category-II: MLT/BMC Design for Workover Section
- 3) Category-III: F&GL Design for Workover Section

The Petitioner submitted a bid dated 29.09.2022 wherein he offered his Rig – Valiant Driller, for Category II. In its bid, the Petitioner has stated that the Rig will be mobilized on the first drilling location to be nominated by the Respondent in West Coast of India within the prescribed mobilization period in line with the tender conditions. It is also stated in the bid that the Rig is presently in Mumbai Port Anchorage and replacement of steel work is in progress as the Rig lost its drilling equipment during the Cyclone 'Tauktae', while the Rig was in operation with the Respondent herein and that the Rig will have to undergo certain modifications/repairs to comply with the tender specifications. It is further stated that the Bid is compliant with Clauses 5.1, 5.2, 5.3 and 6 of Part B.1 (Technical Rejection Criteria) dealing with the technical requirements of the Bidder's Equipment.

6. It is stated that the Petitioner came across certain media reports on 10.11.2022 wherein it was reported that in Category II, in which the Petitioner had placed its bid, five contractors had offered five rigs but due to the disqualification of the Petitioner now four contractors are in the running for

four rigs namely, Jindal (Jindal Pioneer), Aban (Aban IV), ADES (Admarine IX), and Shelf Drilling (Trident II). It is stated that pursuant to the media reports, the Petitioner herein made a representation dated 11.11.2022 to the Respondent highlighting the aforesaid media report wherein it was stated that the Petitioner has been disqualified from the tender process. Since there was no response from the Respondent, the Petitioner has filed the instant petition with the following reliefs:

"a) Issue a writ in the nature of certiorari / mandamus or any other appropriate writ, order or direction setting aside/ quashing any decision purported to have been taken by the Respondent to disqualify the Petitioner's techno-commercial bid of the Rig 'Valiant Driller' Tender dated September 29, 2022 for the Tender bearing Tender No. MR/DS/MM (CH)/12 JU Rigs/2022/P46JC22005 dated July 26, 2022 [annexed as Annexure P-2]; and

b) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondent to consider the Petitioner's bid of the Rig 'Valiant Driller' dated September 29, 2022 for the Tender bearing Tender No. MR/DS/MM(CH)/12 JU Rigs/2022/P46JC22005 dated July 26, 2022 [annexed as Annexure P-2] without reference to any purported decision disqualifying the Petitioner's bid; and

c) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondent to process the bid of the Petitioner dated September 29, 2022 based on the statutory certifications, feasibility reports and certifications issued by the statutory classification agencies, the designated agencies and third party inspection agencies in terms of the Tender, testifying the status/eligibility/feasibility/ of the Rig for Tender

bearing Tender No. MR/DS/MM(CH)/12 JU Rigs/2022/P46JC22005 dated July 26, 2022 [annexed as Annexure P-2]; and Alternative to (a), (b) and (c) above:

d) Issue a writ in the nature of certiorari / mandamus or any other appropriate writ, order or direction setting aside/ quashing the Tender bearing ONGC Tender No. MR/DS/MM (CH)/12 JU Rigs/2022/P46JC22005 dated July 26, 2022 [annexed as Annexure P-2] issued by the Respondent; "

7. It is pertinent to highlight that on 15.11.2022, i.e., after the filing of the instant Writ Petition, the Respondents sent an e-mail to the Petitioners stating that the bid of the Petitioner was techno-commercially evaluated and found to be non-compliant with the terms of the Impugned Tender.
8. Notice in the present petition was issued on 16.11.2022. Pleadings have been completed and the matter was kept for final hearing.
9. Mr. Sandeep Sethi, learned Senior Counsel appearing for the Petitioner, has drawn the attention of this Court to Clause 7 in Part B.2 of the Bid Evaluation Criteria (Commercial Rejection Criteria) which states that the Bidders are required to confirm that they shall mobilize and deploy the Drilling Unit along with the crew to commence the operations at the designated first drilling location nominated by the Respondent within a period of 180 days from the Letter of the Award (LOA). He further draws the attention of this Court to Clause 7(b) in Part B.2 of the Bid Evaluation Criteria to contend that it is stated in the tender document that in case mobilization period falls in monsoon, i.e. between 16th May to 15th October, the mobilization shall automatically stand extended up to 15th October. He contends that the Rig of the Petitioner would be completely ready by the

15th of October and therefore, there was no necessity to disqualify the bid of the Petitioner.

10. Mr. Sethi also draws the attention of this Court to the Respondent's letter dated 12.06.2021 to contend that even for the 2020 Tender, the Petitioner had been asked certain queries by the Respondent regarding the availability of the Rig for which a proper reply had been given by the Petitioner on 23.06.2021. He states that if the Petitioner's Rig could have been considered for the 2020 Tender, there was no reason to disqualify the bid of the Petitioner for the 2022 Tender, i.e. the Impugned Tender.

11. Mr. Sethi places emphasis on the letter dated 13.07.2021, which was sent by the Respondent, informing the Petitioner that his bid had been short-listed for the 2020 Tender. He submits that the Respondent was satisfied by the reply given by the Petitioner on 23.06.2021 regarding the condition of the Rig, and the Respondent *vide* the letter dated 13.07.2021 had requested the Petitioner to confirm the availability of the Rig and upload the confirmation letter in the sub folder of its bid in the 'post bid' area of the correspondence folder on the website of the Respondent.

12. Mr. Sethi, therefore, submits that the Petitioner's bid was complete in accordance with the technical specifications in the Bid Evaluation Criteria and the purported rejection of the same is contrary to the terms of the Bid Evaluation Criteria. He submits that once Petitioner's bid has been accepted for the 2020 Tender, which was very similar to the Impugned Tender, the Petitioner's bid could not have been rejected for the Impugned Tender. He further submits that the Petitioner's Rig will be ready in all aspects before the time when the Respondent would require the Petitioner to mobilize the Rig in terms of the Impugned Tender.

13. Mr. Sethi states that the Respondent had not given any reasons for rejection of the bid of the Petitioner at the time of filing of the Writ Petition and the Petitioner has come to know about the rejection only through media reports. He states that the Respondent ought to have sought clarification from the Petitioner before rejecting its bid. He further submits that in absence of any concrete reason for rejection of Petitioner's bid, the rejection is completely arbitrary and illegal and, therefore, the same be quashed and the Respondent be directed to consider the bid of the Petitioner herein for the 2022 Tender.

14. Mr. Sethi further submits that the Petitioner's Bid is compliant with Clauses 5.1, 5.2, 5.3 read with Clause 6 of Part B.1 of the Bid Evaluation Criteria which mandates that the bidders offering their drilling units which require modifications/up-gradation/re-activation should meet the tender specifications. He states that the Petitioners have also submitted a feasibility report duly approved by the classification agency as is required by the aforesaid clauses. Mr. Sethi therefore submits that the Respondent's decision to only consider operational rigs and not consider the Petitioner's Rig when it is compliant with the aforesaid clauses is arbitrary.

15. *Per contra*, Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the Respondent, submits that the tender in question is of national importance for the purpose of oil and gas production. He states that the anxiety of the Respondent is that only the rigs which are fully functional and operational should be considered for awarding the LOA under the Impugned Tender.

16. Mr. Nandrajog draws the attention of this Court to the letter dated 06.09.2021 sent by the Petitioner to the Respondent stating that massive

damage has been caused to its Rig which got caught in the eye of the Super Cyclone ‘*Tauktae*’. He states that the Petitioner in the letter informed the Respondent that certain equipment at the location where the Rig was situated is completely mutilated and in non-serviceable form.

17. Mr. Nandrajog also draws the attention of this Court to the letter dated 27.10.2021 written by the Petitioner to the Respondent wherein the Petitioner informed the Respondent of the various equipment and materials lost at sea from the Rig as a consequence of it being damaged by the Cyclone “*Tauktae*”. He submits that the petitioner in the aforesaid letter sought a No-Objection Certificate (NOC) from the Directorate General of Hydrocarbon (DGH), stating that the lost equipment is in completely mutilated and non-serviceable form, which needs to be submitted by the Petitioner to the Customs Department.

18. Mr. Nandrajog also states that the Petitioner had been constantly requesting for renewal of the 2018 Contract to extend the contract period and the time for mobilization of the Rig in terms of the 2018 Contract.

19. Mr. Nandrajog places emphasis on the letter dated 27.05.2022 written by the Petitioner to the Respondent informing the Respondent that the insurance underwriter of the Petitioner has concluded that it is not viable to revive the Petitioner’s Rig, Valiant Driller, and the Rig has been declared as a “*Constructive Total Loss*”. In view of the Rig being declared a “*Constructive Total Loss*”, the Petitioner stated that the Agreement is to be deemed as terminated in accordance with the terms of the 2018 Contract. He states that on 05.08.2022, the Respondent has accepted the request of termination of the Petitioner and had terminated the Contract of the Petitioner with effect from 17.05.2021.

20. It is contended by Mr. Nandrajog that the Respondent cannot afford to consider the Rig which has been totally damaged by the Cyclone and which has been declared as “*Constructive Total Loss*” by the insurance underwriter and deemed not viable for revival. He further submits that it is not the case of the Petitioner that they have any other alternate Rig which can be offered to the Respondent.

21. Mr. Nandrajog further contends that Clause 6 of the BEC only permits modifications/up-gradation/re-activation for those rigs which are in serviceable and good condition and it cannot apply to the Rigs which have been totally damaged and thus the decision of the Respondent to reject the bid cannot be said to be arbitrary.

22. Heard Mr. Sandeep Sethi, learned Senior Counsel appearing for the Petitioner and Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the Respondent, and perused the material on record.

23. The undisputed facts of the case are that the Respondent awarded a contract to the Petitioner in 2018 i.e., the 2018 Contract, and the Petitioner offered the Rig, Valiant Driller, to the Respondent for a period of three years commencing from 08.10.2018 in terms of the 2018 Contract. On 17.05.2021, while the Rig was operational, it was caught in the eye of the Super Cyclone “*Tauktae*” and suffered heavy damage. A perusal of the letter dated 27.10.2021 which was written by the Petitioner herein to the Respondent herein shows the details of the material and equipment of the Rig which have been lost due to Cyclone “*Tuaktae*” on 17.05.2021. The relevant portion of the said letter reads as under:

“*Dear Sir,*

This is further to our letter no DDSPL/ONGC/JACKUP/P46JC17001/22 ONGC to intimate DGH regarding the materials / equipment lost in the sea from rig Valiant Driller due to Cyclone "Tuaktae" on 17th May 2021.

The details of material/ equipment lost are as under:

- *Derrick structure.*
- *Crown Block.*
- *Travelling Block*
- *Drill Line*
- *Draw works with Makeup Cathead, Breakout Cathead, Blowers*
- *Swivel*
- *Elmagco*
- *Top Drive with Pipe Handler*
- *Rotary with Master Bushing & Hydraulic motor*
- *Choke Manifold*
- *DeadLine Anchor*
- *Standpipe Manifold*
- *Driller's Cabin with Instrumentation, Control System (PLC) & Purge System*
- *Air Winches x 3*
- *Man Rider Winches x 1*
- *Ezy Torque with Hydraulic Unit*
- *Mud rotary Hoses along with snubbing lines*
- *1 lot Chiksan Pipes, X/Os, Elbows*
- *Hang off line*
- *MGS Gas Vent Lines*
- *Life Jackets*
- *Spill Kit*
- *Full Body Safety Harness with lanyard*
- *Man Rider Belt*
- *Fall Arrestor*
- *HP Service Hoses*
- *Rig Floor sub structure with Skidding System*
- *Mathey Wireline Unit Unit*
- *Choke and Kill Manifold*

- *Cementing Manifold*
- *1 lot X Sheaves, Chain Blocks & Hand Tools*
- *1lotX Shackles & Slings of Various Size*
- *1lot X PPE Box*
- *1 lotX SCBA Sets*
- *Eye Wash Station*
- *Bug Blower*
- *1 lot X Walkways, Gratings, Handrails, Ladders*
- *AC/DC Electrical Cables*
- *Manual Water Deluge System*
- *Sensors of Combustible Gas Monitoring System*
- *Sensors of Gas/Fire/Smoke Detection*
- *Derrick Escape System”*

24. On 27.05.2022, the Petitioner wrote another letter to the Respondent herein highlighting that the insurance company has declared its Rig as “*Constructive Total Loss*” and that the Contract be deemed to be terminated. The said letter reads as under:

“*Subject : Request ONGC for mutual Consent to treat the Charter Hire Agreement of Rig Valiant "Valiant Driller" for termination*

Reference 1. *Agreement No. MR/DS/MM(CH)/8RIGS/2017/1346 1C17001/9010026434 dated 26" March 2018 for Charter Hire of Drilling Unit "Valiant Driller"*

2. *DDSPL Letter No. DDSPL/ONGC/JACKUP/P461C17 001/2022/ 27 dated 12" May 2022*

Dear Sir,

This is further to our above referred letter dated 12' May 2022.

We would like to inform you that Rig Valiant Driller is successfully moved from the N-24 Platform Location to

Mumbai Port Y-4 Anchorage location after duly completing the salvage operation of the fallen derrick structure in to the sea due to the impact of Cyclone "Tauktae". The incident of the damage occurred on account of Natural Calamity which was totally beyond our control.

Our sincere thanks to ONGC for all the support extended Post "Tauktae" and during the Salvage Operations.

As intimated in our letter dated 12th May 2022, the inspection by the concerned authorities including class and insurance have been carried out. Our Insurance Underwriter, New India Assurance Company Ltd has concluded that it is not viable to revive Valiant Driller as a drilling unit for deploying under the current above referred Agreement as cost of revival is extremely higher than the applicable Insurance coverage of the Rig, and therefore insurance have considered the Rig is a Constructive Total Loss. The declaration from Insurance Company (The New India Assurance Co. Ltd) is attached herewith for your reference and considerations.

In view of the Clause 20 of the Charter Hire Agreement dated 26th March 2018, the Rig "Valiant Driller" having been declared by the Insurance Company as "Constructive Total Loss", the Agreement shall be deemed terminated in respect of Rig "Valiant Driller" as of the event causing is construed to be Total Loss in terms of Clause 22.3 of the Agreement. Accordingly, each Party (ONGC & Dynamic) to the aforesaid Agreement shall thereupon be released of all further obligations thereunder in respect of Rig "Valiant Driller".

Thanking you and assure you our best services at all time."

(emphasis supplied)

Pursuant to the abovementioned letter, the contract was terminated on 05.08.2022 with effect from 17.05.2021.

25. The material on record indicates that Part B of the Bid Evaluation Criteria and more particularly Part B.1 which deals with the technical rejection criteria of a bid states that a bidder should strictly comply with the conditions specified therein failing which their bids will be rejected. Clauses 5.1, 5.2, 5.3 read with Clause 6 of Part B.1 of the Bid Evaluation Criteria mandates that the bidders offering their drilling units which require modifications/up-gradation/re-activation should meet the tender specifications and should submit a feasibility report duly approved by the classification agency to which the drilling unit is presently classed to. In terms of the said Clause, a technical feasibility report was submitted by the Petitioner herein. The report indicates that the following equipment were not installed or were missing from the Rig at the time of inspection:

- “
- *Derrick and substructure.*
 - *Rig floor and associated accessories*
 - *Drillers Cabin.*
 - *Draw works and accessories,*
 - *Top drive system.*
 - *Travelling Block*
 - *Crown Block*
 - *Transverse Skidding system*
 - *Choke and Kill manifold system*
 - *Standpipe manifold*
 - *Tuggers and Man riders*
 - *Mud Cleaning equipments including its complete structure”*

26. A perusal of the abovementioned missing parts shows that virtually the

entire sub-structure of the Rig of the Petitioner is missing. The contention of the learned Counsel for the Respondent is that Clause 6 of the BEC only permits modifications/up-gradation/re-activation for those rigs which are in serviceable and good condition and it cannot apply to the Rigs which have been totally damaged and thus the decision of the Respondent to reject the bid cannot be said to be arbitrary. The Petitioner itself had asked the Respondent herein for termination of the 2018 Tender by writing the letter dated 27.05.2022 which is just two months before the 2022 Tender was floated. Therefore, it cannot be said that the decision of the Respondent to consider only those Rigs which are operational on the date of the tender is arbitrary.

27. It is stated by the learned Counsel for the Respondent that the Petitioner withdrew his Rig from the 2020 Tender *vide* letter dated 14.07.2021 and the exchange of letters between the Petitioner and the Respondent in the context of the 2020 Tender cannot be taken into consideration for the 2022 Tender. Further, the technical feasibility report submitted by the Petitioner shows that the Rig of the Petitioner is virtually in no condition to operate as its entire substructure is missing.

28. The scope of interference under Article 226 of the Constitution of India in matters of tender is well settled. 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.”

29. In Uflex Ltd. v. State of T.N., (2022) 1 SCC 165, the Apex Court has observed as under:-

*“2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. **The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.** [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517].”*
(emphasis supplied)

30. The Apex Court in a number of judgments has crystallized the test to be taken into account by the Courts before interfering in tender matters which reads as under:-

“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. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

[Refer: Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216; Ranaq International Ltd. v. I.V.R. Construction Ltd. & Ors., (1999) 1 SCC 492 etc.]

31. In view of the above, it is well settled that the scope of interference by the High Court while exercising its jurisdiction under Article 226 of the Constitution of India is extremely narrow. This Court ought not to interfere unless it is established that the process adopted by the decision-making authority is *mala fide*, intended to favor someone, arbitrary or irrational. In case the decision-making process is just, fair and reasonable, the writ courts must loathe to interfere with the award of contracts by the State/Instrumentalities of the State. The decision taken by the Respondents cannot be said to be vitiated by any of the aforesaid criteria.

32. The Apex Court in Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818, has observed as under:-

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)], (2016) 8 SCC

622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. **Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.**

12. In *Dwarkadas Marfatia and Sons v. Port of Bombay* [*Dwarkadas Marfatia and Sons v. Port of Bombay*, (1989) 3 SCC 293] it was held that the constitutional courts are concerned with the decision-making process. *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. **However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority.** This was confirmed in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] as mentioned in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99].

13. In other words, a mere disagreement with the decision-making process or the decision of the

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

(emphasis supplied)

33. This position has also been reiterated by the Apex Court in Municipal Corporation, Ujjain & Anr. v. BVG India Limited & Ors., (2018) 5 SCC 462.

The relevant portion of the said judgment reads as under:-

"14. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference under Article 226.

15. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the

specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.

16. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere. (See the judgment in Air India Ltd. v. Cochin International Airport Ltd. [Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617])"

34. The aforesaid decisions make it clear that in a challenge to the decision of a Tendering Authority, the Court must consider whether the decision has been made lawfully and not whether the decision is sound. The Court's should interfere in such decisions only when the decision made is so perverse, irrational and arbitrary that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached.

35. In Silppi Constructions Contractors vs. Union of India and Anr., (2020) 16 SCC 489, the Apex Court has observed as under:-

*"19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. **The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.***

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts

should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case." (emphasis supplied)

36. In N.G. Projects Limited v. Vinod Kumar Jain and Ors., (2022) 6 SCC 127, the Apex Court has held as under:-

"23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek

damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

(emphasis supplied)

37. A perusal of the abovementioned judgments would show that the tendering authority is the best judge to decide as to whether the bidder has qualified the conditions prescribed in the tender document or not. The Court should not sit as an appellate authority over the decision taken by the tendering authority and come to a conclusion that the decision taken by the tendering authority on technical aspects should be interfered with or not. The interference as stated by the Apex Court in such matters is extremely narrow and the courts should refrain from exercising their jurisdiction under Article 226 of the Constitution of India unless there is *mala fide* or the decision was intended to favour someone or is so perverse that no prudent person could have come to that decision.

38. A perusal of the material on record would show that even as per the technical feasibility report, the Rig of the Petitioner was in no condition to operate and a number of material and equipment of the Rig are missing including the sub-structure of the Rig. In view of the above, it cannot be said that purported decision of the Respondent herein in rejecting the bid of the Petitioner herein is arbitrary or illegal and requires interference by this Court. It can also not be said that the Petitioner's bid has been rejected only to single out the Petitioner in order to favour another bidder. Rather, accepting the

Petitioner's rig can lead to substantial delay in a project which is of national importance and is likely to derail the Respondent's drilling schedule and affect the overall oil & gas production of India. In light of the aforesaid, this Court does not find any reason to interfere with the purported decision of the Respondent herein. This Court, at this juncture, is also not going into the question as to whether the instant Writ Petition is pre-mature or not.

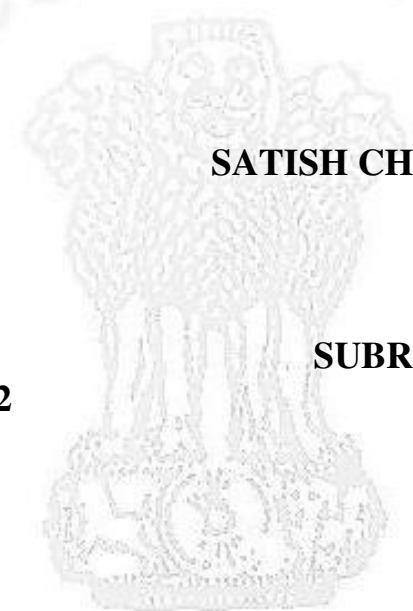
39. Accordingly, the present Writ Petition stands dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

DECEMBER 22, 2022

Rahul



सत्यमेव जयते