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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.98 OF 2023

1. Shinde Developers Private Limited,
a company incorporated under the
Companies Act, 1956, having its registered
address at Sector number 1/332/2-3,
Plot no 22, Gulmohar Park, ITI Road,
Aundh, Pune 411007.

2. Mr. Siddhant Shinde
Age 59 yrs c/o Director of Shinde
Developers Private Limited, a company
incorporated under the Companies Act,
1956, having its registered address at
Sector number 1/332/2-3, Plot no 22,
Gulmohar Park, ITI Road, Aundh,
Pune 411007.

3. M/S SHREE SUKHSAGAR
HOSPITALITY SERVICES,
through its proprietor Shri Shivchandra
Shetty having his office at Mayur
Apartment, House No.1068,
Shop No.3/4, Sector-5, Koparkhairane,
Navi Mumbai – 400 049. … Petitioners

Versus

1. Mormugao Port Authority,
established under the
Major Port Trusts Act,
1963, having its address at,
Mormugao Port, Goa.

2. J.M. Baxi Ports & Logistics Limited
a company incorporated

under the Companies Act,
1956, having its registered
address at Godrej
Coliseum, B-1001, 10th
Floor, Behind Everard
Nagar, Off Somaiya
Hospital Road, Sion (East),
Mumbai-, Maharashtra –
400022.

3. Sanjay Construction Co.
Through Mr. Sanjay Harjivanbhai Patel
Proprietor of Sanjay Construction Co.
Having its registered address at
16th Floor, Solitaire Sky,
Beside Hyatt Regency, Opp.
Gujarat Vidyapith, Central
Business District, Ashram
Road, Ahmedabad, Gujarat-380014 ... Respondents

Mr S.S. Kantak, Senior Advocate with Mr Nikhil Pai, Ms Neha Kholkar, Mr Narcinha Verenkar, Ms Saicha Desai Mr P. Talaulikar, Mr Abhijeet Gosavi and Mr Adithya Unni, Advocates *for the Petitioners*.

Mr Shivan Desai with Mr A. Sardessai, Advocates *for Respondent No.1*.

Mr N.N. Sardessai, Senior Advocate with Mr Parag Rao, Mr K. Sabnis, Mr S. Fadte, Mr S. Dessai and Mr P. Bandodkar, Advocates *for Respondent No.2*.

Mr Kaif Noorani, Advocate *for Respondent No.3*.

CORAM: DHIRAJ SINGH THAKUR & VALMIKI SA MENEZES, JJ.

RESERVED ON: 24th March, 2023

PRONOUNCED ON: 26th June, 2023

JUDGEMENT: ***(Per Valmiki Sa Menezes, J.)***

1. Rule. Rule is made returnable forthwith by the consent of the parties, petition is disposed of at the stage of admission.

2. By this writ petition, under Article 226 of the Constitution of India, the Petitioners seeks a writ of certiorari to quash the decision of Respondent No.1 (Mormugao Port Authority) dated 02.02.2023 treating the Petitioners as disqualified, under the technical eligibility criteria, relating to the tender process for "Request For Proposal" (RFP) for Operation and Maintenance of International and Domestic Cruise Terminals and Ferry Terminals at Mormugao Port at Goa, to be run on public-private partnership (PPP). Consequent to the claim of the relief of quashing the decision of disqualification of the Petitioners under the technical eligibility criteria for the bid, the Petitioners seek a direction to the Respondent No.1 to treat the Petitioner as a qualified bidder and to open the financial bid of the Petitioners, and in the event that they are the lowest bidders, to award the contract for operations and maintenance of International and Domestic Cruise Terminals and Ferry Terminal at Mormugao Port, on PPP basis to the Petitioners.

3. Petitioner No.1 claims to be a company carrying on the business of construction and development of infrastructure projects. Petitioner No.2 is the Director of

Petitioner No.1, while Petitioner No.3 is a proprietary concern, whose sole proprietor carries on the business of restaurants, catering and other hospitality businesses.

The Respondent No.1 establishment was a Major Port Trust under the erstwhile Major Port Trusts Act, 1963 and is now constituted as an authority under the Major Port Trusts Act, 2021 ("the said Act") being an authority under the Ministry of Shipping, Government of India. It is the Petitioners' case that the Respondent No.1 is mandated under the Act to maintain the Port of Mormugao, at Goa and according to the Petitioners, is a "State", within the meaning of Article 12 of the Constitution of India and is thus amenable to writ jurisdiction of this Court.

4. Respondent No.2 is one of the three bidders to the Request for Proposal (RFP) for the operation and maintenance of the Cruise and Ferry Terminals proposed to be set up by the Respondent No.1 at Mormugao Port; the technical bid of Respondent No.2 was considered by the Respondent No.1 as responsive and was accepted as the sole bidder to the RFP while the bid of the Petitioners was considered non-responsive.

5. It is further the case of the Petitioners that as part of the statutory mandate of being required to maintain the Port of Mormugao at Goa, the Respondent No.1 sought to develop a World Class International and Domestic Cruise Terminal with state-of-the-art facilities at Mormugao Port, to prepare for the rising demand and increasing traffic of cruise passengers, and in furtherance of this proposed development, invited bids from qualified firms (RFP), for operation and maintenance of the Cruise and Ferry Terminals at Mormugao Port, on a PPP basis through the RFP issued in May 2022. By the bidding process, the Respondent No.1 intended to qualify and select a suitable bidder through an open competitive bidding process in accordance with the procedure set out in the RFP document.

6. The Petitioners then aver that the term “bidder” as contended in the RFP document, though specifically not defined in the RFP, was to mean, unless repugnant to the context, to include the members of a consortium. The RFP was silent as to the definition of the term “bidder”. It is the Petitioners' case that the bidding process was to comprise of two submissions, the first submission being the technical bid and the second submission being the financial bid. That the eligibility and qualification of the bidder was first to be examined based on the details submitted under the technical bid, with respect to the eligibility and qualification criteria prescribed under the RFP; the financial bid was to be opened only after the technical bid was responsive to the eligibility and qualification requirements under the RFP. It is the Petitioners' case that the final selection of the operator was to be made on the basis of evaluation of the financial bids of the qualified bidders.

7. The Petitioners further aver that under Clause 1.1.9 of the RFP, the selected bidder was to incorporate a Special Purpose Vehicle (SPV) under the Companies Act, 2013 prior to execution of the Operation and Management Agreement (O & M Agreement). Further, though the explanation under Clause 2.1.13 would include each member of the consortium, in case the bidder was a consortium, in terms of Clause 2.2.1 of the RFP, the consortium could have a maximum of three members, and if such consortium was bidding, its lead member was required to have an equity shareholding of at least 51% of the equity of the SPV at all times, till the first anniversary of the COD Project.

8. The Petitioners further aver that the Petitioner No.1 being part of a consortium of bidders, met the eligibility criteria for the technical bid since it was a company; however, though Petitioner No.3, who was a lead member of the consortium, had not submitted any of its documents to fulfill any technical criteria, the technical criteria having been fulfilled by the other members of the consortium, the Petitioners proceeded to submit a Joint Bidding Agreement on the undertaking that in the event that they were the successful bidder, they would form the Special Purpose Vehicle (SPV), which would be a private limited company as was required by the conditions of the RFP.

9. The Petitioners then aver that despite them being technically qualified under the technical eligibility criteria on the basis that Petitioner No.1, as a member of the consortium was a company, and despite having submitted the Joint Bidding Agreement with the undertaking to form an SPV, Respondent No.1 informed the Petitioners that since Petitioner No.3 was a proprietary concern run by an individual person, the Petitioners were not eligible to bid for the tender; it is the Petitioners' case that the rejection of the Petitioners bid as being not qualified, was contrary to the opinion obtained by the Respondent No.1 from Feedback Infra Private Limited, the agency that prepared the RFP, and the “Transaction Advisory” of the Respondent No.1, for evaluation of the bids.

10. It is the Petitioners' case that Petitioner No.3 addressed a letter dated 15.12.2022 to the Independent External Monitor (IEM) of the Respondent No.1 recording its objection to the proposal of the Respondent No.1 to disqualify the Petitioners as being ineligible under the technical eligibility criteria, there being no bar to an individual/proprietor to be a joint bidder in the tender process. The Petitioners claimed that similar letters were addressed by them on 17.12.2021 to the IEM, who forwarded the same to the Respondent No.1 on 18.12.2022, though there was no response to the same.

Not having received any response to their objection, the Petitioner approached this Court with the present petition seeking the reliefs referred to above.

11. On receiving notice, Respondent No.1 filed its affidavit in reply dated 13.02.2023 wherein it has stated the following facts and raised the following contentions:-

a. That the Respondent No.1 had communicated to the Petitioners vide an email dated 11.02.2023 the grounds for disqualification of their bid, which were primarily due to the fact that the bid was found non-responsive to Clause 1.1.9, 2.11.5 and Clause 3.4.3 of the RFP.

b. That the Tender Advisory Committee of the Respondent No.1 was assisted by M/s Feedback Infra Private Limited, who was appointed as the Transaction Advisory and had initially recommended the qualification of concerned Petitioners.

c. That the submitted bids were scrutinized by the Transaction Advisor and then evaluated by the Tender Advisory Committee during which evaluation, it was noticed that one of the consortium members of the Petitioners, the

Petitioner No.3, was a proprietorship concern and not a company; that the Transaction Advisory opined that despite the fact that the Petitioner No.3 was not a company, the Petitioner consortium was eligible under the RFP.

d. That the Tender Advisory Committee did not agree with the position taken by the Transaction Advisor's aforesaid opinion, instead opining that all the consortium members had to be a Company incorporated under the Companies Act, and accordingly, the Tender Advisory Committee thought it fit to obtain two legal opinions, one from the empanelled Advocate of the Respondent No.1 and the other from a retired High Court Judge on whether the RFP allowed for a bid from a consortium of which a sole proprietor was a member.

e. The two legal opinions received by Respondent No.1 opined that according to the RFP, all consortium members who bid, were required to be companies and therefore, the Petitioners were not eligible and qualified to bid.

f. On considering these opinions, the Tender Advisory Committee endorsed the decision taken by the Transaction Advisory recommending that the bid of the Petitioners No.1 and 3 be disqualified and this recommendation was accepted by the board of Respondent No.1 in its meeting dated 02.02.2023 under its resolution of the same day.

g. Under the same criterion, the other bidder, M/s Sanjay Constructions did not technically qualify for the tender, while Respondent No.2 was held to be technically eligible in terms of the RFP and accordingly the second submission (financial bid) of the Respondent No.2 was opened on 08.02.2022.

12. The Respondent No.2 has filed its affidavit in reply dated 9th March 2023 wherein the following contentions were raised:-

a. That the petition is not maintainable as it purports to challenge the award of the tender by Respondent No.1 to Respondent No.2 on grounds which are beyond the scope of this Court's writ jurisdiction, as the Petitioner does not challenge the decision-making process of the tender as being illegal, irrational or perverse, but seeks to challenge the actual decision of the Respondent No.1 which has followed due process and arrived at a reasonable interpretation of the tender document.

b. That Respondent No.1 has followed all proper procedures before awarding the tender, including obtaining independent legal advice in the form of opinions, and then arrived at its conclusion on the ineligibility of the Petitioners to the bidding process; that the process followed by the Respondent No.1 in the arrival of a decision to reject the Petitioners' technical bid cannot be termed as arbitrary or unreasonable or perverse and thus cannot be agitated before this Court in its writ jurisdiction under Article 226 of the Constitution of India.

c. That the interpretation given by Respondent No.1 to the eligibility criterion that a “Bidder” required, that every member of a consortium bidding was required to be a company, was a reasonable interpretation and that the decision to insist on only corporates to be part of the tender process was a reasonable condition.

13. During the course of hearing of the matter, this Court called upon the Respondent No.1 to place the financial bid of the Respondent No.2 on record, only to ascertain whether the financial bid of the Petitioners was higher than that of the Respondent No.2. This course was adopted in the light of the fact that the entire aim of the process of bidding under the RFP was to invite the highest revenue collection by the Respondent No.1 in terms of the services to be provided at the terminals to be contracted out by the Respondent No.1.

The Financial Bid of the Petitioners was made known through a chart at page 310 of the Record, under Additional Affidavit dated 20.02.2023 whereat the Rent proposed by the Petitioners over 30 years was tendered at ₹1,65,13,68,361/-. The bid tendered by the Respondent No.2 was made public when it was uploaded on the e-procurement system of the Government of India website on 08.02.2023. The Petitioners have placed on record at page 310 of the file a comparative chart of calculations of rent offered over 30 years by the Petitioners (referred to as “SSH”) on the chart and that of the Respondent No.2 (referred in the chart as “JM Baxi”). The financial bids and calculations as shown on the chart are not in dispute and the details therein are supported by an Additional Affidavit dated 20.02.2023 of Shri Sandesh Salian on behalf of the Petitioners, which have not been controverted by the respondents.

14. The rent proposed over the period of 30 years by the Petitioners is ₹1,65,13,68,361/- and after considering escalation of 4%, the rent receivable by the Respondent No.1 from the Petitioners at the end of 30 years would have been ₹1,71,61,99,095/- as bid by the Petitioners.

In comparison, the rent offered by the Respondent No.2 at the end of 30 years is Rs.67,45,78,579/- almost ₹1,00,00,000/- less than that offered by the Petitioners; the amount offered by the Respondent No.2 would entitle the respondent No.1, after escalation of 4%, at the end of 30 years to a total rent of ₹70,10,61,722/-. The difference in the bid offered by the Petitioners to that of the Respondent No.2 works out to ₹1,01,51,37,373/-. Noting the glaring difference between the two bids, we proceeded to hear the petition at the stage of admission and dispose of the same by consent of the parties.

15. Heard learned Senior Advocate Mr Subodh S. Kantak for the Petitioners, learned Advocate Mr Shivan S. Desai for the Respondent No.1, learned Senior Advocate Mr Nitin N. Sardessai for Respondent No.2 and learned Advocate Mr Kaif Noorani for Respondent No.3.

16. We have perused the entire record of the petition, the various provisions of the General Financial Rules, 2017 along with the amendments incorporated therein, as are applicable to the process of procurement of goods and services by the Respondent No.1; we have also considered the written submissions placed by the parties before us with the case law relied upon by them.

17. It is the primary submission of the learned Senior Advocate Mr Kantak for the Petitioners that on a plain reading of the RFP, more particularly Clauses 1.1.8, 1.1.9, 2.1.1 and 2.3.1, there could be no prohibition for accepting a technical bid of a consortium of bidders, of which one of them was an individual person or a sole proprietorship concern. He further submits that the RFP does not define the word “bidder”, nor does a plain reading of the entire RFP, including appendixes I, II, XIII thereof, contain any prohibition to an individual person or a sole proprietorship concern offering a joint bid under a consortium of bidders to the tender process; This, as submitted is more so in the light of the new regime under a General Financial Rules, 2017 (GFR) applicable to the Respondent No.1 in the process of procurement of goods and services, the sole purpose of the GRF being to encourage and allow for competitive bids from individuals, corporates or in form of entities, to offer the highest revenue to the Respondent No.1 service provider.

He argues that Appendix XIII to the RFP incorporates an office memorandum dated 23.07.2020 issued by the Ministry of Finance, Public Procurement Division, which specifies the restrictions under Rule 144 (XI) of the GFR, 2017. He further submits that Rule 144 of the GFR, including Clause XI therein, brought by way of amendment, applies to the tender process to procure goods and services by the Respondent No.1. That certain restrictions have been imposed under Clause XI of Rule 144 of the GFR with respect to bidders seeking to provide services, who are from a country which share a land border with India, as specified under definition Clause 8 of the Office Memorandum; that the order dated 23.07.2020 of the Ministry of Finance inserting Clause XII into Rule 144 of the GFR, specifically defines the word “bidder” under Clause 6 thereof, to mean any person or firm or company, including a member of a consortium or joint venture, thereby clearly including an individual person or a sole proprietor to be qualified to be a bidder either individually or as part of a consortium. He submits that there is no prohibition for an individual or a sole proprietor as a member of a bidding consortium to participate in the bid process under this clause, which, if it is accepted to be applicable to a bidder from a country which shares a land border with India, could certainly not prohibit such a “bidder”, being an individual or sole proprietorship concern, as a member of a consortium, if he were a citizen of India, as in the case of the Petitioner No.3.

18. It is further the Petitioners' contention that under Annexure III to the aforementioned office memorandum applicable to the Respondent No.1, the model clauses for tenders define the word “bidder” which includes any “person” or “firm” or a “company” and includes any member of a consortium or joint venture. The model clauses for tenders under Annexure III, as contended by the Petitioners, do not prohibit an individual or a sole proprietorship concern from the bidding process, and there being no disqualification, the impugned order of the Respondent No.1 holding the Petitioners' technical bid to be non-responsive, was arbitrary.

It is the Petitioners' contention that under the RFP, the technical bids were first to be evaluated and on such a technical bid being found responsive, the financial bid would then be opened. The learned Counsel for the Petitioners' submits that the entire process followed by the Respondent No.1 at arriving at the conclusion, that the technical bid of the Petitioners was non-responsive, was contrary to the process set down in the RFP and it is this arbitrary process which has culminated in disqualifying the Petitioners under the technical eligibility criterion of the RFP that is under challenge in this petition. It was submitted that the requirement to form a single entity or a group of companies, if its technical and financial bid were accepted, would be required to incorporate itself as a Special Purpose Vehicle (SPV) under the Companies Act, 2013, prior to the execution of the O & M Agreement, and such undertaking should be given as part of the bidding documents, which in fact was submitted by all the Petitioners; though this process under Clause 1.1.9 itself is a pointer to the fact that the existence of the Special Purpose Vehicle was not required at the stage of technical bidding as Clause 1.1.9 itself refers to the "selected bidder" being required to form the SPV prior to execution of the O & M Agreement.

19. It is further the Petitioners' submission that if one examines the process followed by the Respondent No.1 from the stage of evaluation of the technical bid, the record would clearly demonstrate that the various agencies of the Respondent No.1, which included the Transaction Advisor and the Tender Evaluation Committee, were themselves not certain of the interpretation of the various clauses of the RFP, even though it is a matter of record that the RFP was in fact drafted by the Transaction Advisor to the Respondent No.1. Learned Advocate Mr Kantak takes us through the chronology of events and the process followed by the Respondent No.1 which has culminated in the rejection of the Petitioners' bid as being non-responsive and makes specific reference to the following dates and events:-

Sr. No.	Date	Event
1	07.07.2022	Technical bids of the Petitioners, Respondent No.2 and Respondent No.3 were opened.
2	04.08.2022	The Technical Evaluation Report was prepared by the Transaction Advisors (Consultants) M/s Feedback Infra Private Limited in which it was recorded that there was an issue of interpretation as to whether an eligible bidder could be a natural person or was required to be only a company incorporated under the Companies Act.

		The Transaction Advisor opined that a natural person/ sole proprietorship is a legal entity and can be considered as an eligible bidder (as recorded at Page 219 of the proceedings of the Tender Committee Meeting held on 30.12.2022). The Petitioners were held to be eligible.
3	September, 2022	The Tender Evaluation Committee not being satisfied with the opinion of the Transaction Advisor that a sole proprietorship concern was eligible, the committee decided to seek legal opinion of the Advocate of the Respondent No.1; this fact was recorded in its minutes at Clause 14.2, whereat no reasons were specified by the Tender Committee as to why the opinion of the Transaction Advisor was being rejected. Clause 14.7 of the minutes of the Tender Committee dated 30.12.2022 also records that whatever the stand that may be taken by the Transaction Advisor, the same was not acceptable and that, except for the Respondent No.2, the other two bidders were not eligible for participation in the bidding process. Legal opinion was sought from the empannelled Advocate of the Respondent No.1, who opined that the stand taken by the Transaction Advisor was not acceptable and it was only the Respondent No.2 who was eligible, as the RFP prohibits a sole proprietorship concern from being a member of a bidding consortium.
4	22.09.2022	That from the contents of the proceedings of the Tender Committee Meeting dated 30.12.2022, after the opinion of Advocate Yogesh Nadkarni was obtained by the Respondent No.1, and this opinion was found to be contrary to the opinion of the Transaction Advisor, the Chairman of the Respondent No.1 by letter dated 22.09.2022 sent a letter to the concerned Ministry which then directed the Respondent No.1 to take appropriate action at its own level vide letter dated

		11.11.2022; thereafter the Board of the Respondent No.1, in its meeting of 03.11.2022 resolved that it would take legal opinion of a retired Supreme Court Judge or a High Court Judge and accordingly sought the opinion of Justice F.M. Reis, Retired Judge of the Bombay High Court.
5	07.12.2022	The opinion of Justice F.M. Reis was received by the Respondent No.1 opining that the Petitioners and the Respondent No.3 do not meet with the eligibility criterion since one of the consortium members of the Petitioners was a sole proprietor.
6	28.12.2022	A final technical evaluation report was submitted by the very same Transaction Advisor, this time changing his opinion and recording that in view of the legal opinion received by Respondent No.1, outlining that the sole proprietorship bidders, Petitioners as a consortium and the Respondent No.3, did not meet the basic eligibility criterion provided under the RFP, the Petitioners technical bid was considered non-responsive. Petitioners' technical bid along with that of the Respondent No.3 was considered non-responsive. This report dated 28.12.2022 was submitted to the Tender Committee.
7	30.12.2022	The Tender Committee, at its meeting decided to treat the Petitioners' technical bid as non-responsive along with that of the Respondent No.3, thus, disqualifying the Petitioners from the tender process.

20. It is the submission of the learned Senior Counsel for the Petitioners that on a perusal of the decision-making process referred to in the above chronology, the arbitrariness in the process followed by the Respondent No.1 to arrive at its final decision of holding the

Petitioners' bid to be not responsive, is manifest and glaring. It was submitted that the initial decision of the Transaction Advisor, who was the consultant that had drafted the RFP, holding the Petitioner No.3 to be eligible as a sole proprietorship concern to bid on behalf of the consortium, was then vetoed by the Tender Evaluation Committee, which, without assigning any plausible reasons, opined that the Respondent No.1 should take an opinion of their Advocate; that further arbitrariness in the decision-making process is manifest from the decision of the Board to seek an opinion from their Advocate, and when such opinion was found to be contrary to the one expressed by the Transaction Advisor to the Respondent No.1, a further arbitrary and irrational decision was taken on 22.09.2022 to seek yet another legal opinion from a retired Supreme Court or High Court Judge. It is then submitted that the arbitrariness in the process was further compounded by the fact that the opinion of retired Justice F.M. Reis stated that the Petitioners were not qualified and eligible to bid since Petitioner No.3 was a sole proprietorship concern, further to which the Transaction Advisor then changed its initial opinion of 04.08.2022 and this time opined that in view of the legal opinion received, the Petitioners were considered to be disqualified from the bidding process and were held to be not responsive.

The Petitioners submit that from the minutes of the meeting of the Tender Committee held on 30.12.2022, it further transpires that in the month of December 2022, the Respondent No.1 received a letter from the Ministry of Home Affairs stating that one of the Directors of the Respondent No.2 bidder had received charge-sheets in criminal proceedings in the year 2008 and 2009, which cases were under trial and these criminal proceedings were not disclosed and declared by the Respondent No.2 while submitting its bid. When the question arose as to whether the non-disclosure of the pending criminal cases in the bid submitted by Respondent No.2 would amount to a fraudulent practice under Clause 4.1.1 of the RFP, the Committee once again obtained a legal opinion of Advocate Nadkarni for the Respondent No.1, who opined that the omission in declaring the criminal cases against Directors of Respondent No.2 would not amount to a violation of the mandatory conditions of the RFP.

It was submitted that this entire process was clearly aimed at disqualifying the other two bidders from the process and leaving the Respondent No.2 as the sole bidder in the fray, notwithstanding the fact that the Petitioners had offered a financial bid which was three times higher than that offered by the Respondent No.2.

21. Learned Advocate Mr Shivan Desai for the Respondent No.1 submited that the entire process followed by the Respondent No.1 for evaluating the technical bids of the three bidders was totally fair, transparent and based upon sound legal opinion obtained by the Respondent No.1. It was further contended by the Respondent No.1 that there was no infirmity in the decision-making process followed by the Respondent No.1, this process being comprised of setting up a Tender Advisory Committee comprising of senior technical persons, assisted by the Transaction Advisor; that merely because the Transaction Advisor had initially opined that the Petitioner No.3 not being a company was of no consequence to the bid tendered by the Petitioner consortium, would make no difference to the process, as the contrary opinion of the Tender Advisory Committee was then substantiated by two legal opinions which concluded that the Petitioner consortium was not eligible to participate in the bidding process, the Petitioner No.3 not being a company.

22. The further submission of the Respondent No.1 was that the interpretation given by the Respondent to the various clauses contained in the RFP, that Indian entities which are not companies registered under the Companies Act were not eligible to be a member of a consortium participating in the bidding process was reasonable; and that this interpretation was required to be given primacy, as based upon the combined reading of Clause 1.1.9, 2.11.5, 3.4.3 and the contents of Annexures A and B of Appendix I and Annexure V would demonstrate the intent of the Respondent No.1 to exclude non companies from bidding in the tender, that such an interpretation given by the Respondent No.1, as the author of the tender document should be accepted as the Respondent No.1 was the best person to understand its own requirements; that Constitutional Courts must refrain from arriving at its own interpretation, unless there are malafides or perversity in understanding or appreciation of the terms of the tender document.

23. It is the further submission of the Respondent No.1 that even if two interpretations are possible on a plain reading of the tender documents, the interpretation of the author (Respondent No.1) must be accepted, more so, when the Petitioner has chosen not to throw a challenge to the terms of the RFP itself.

It was then contended that the interpretation given by the Respondent No.1 and its intent to exclude proprietorship or partnership concerns from being part of a bidding consortium was based on the fact that the SPV which was required to be incorporated, was in fact required to be set up prior to the execution of the O & M Agreement; that if such SPV was not already set up, then the purpose of excluding individuals from the bidding process was to aid the intent of the Respondent No.1 to only deal with corporates registered under the Companies Act and no other entities. The Respondent further contends that the definition of the word “bidder” under GFR Rule 144 (XI) was applicable only to bidders from neighbouring countries which is a clause by itself, and such definition in the Rules, not having been authored by the Respondent No.1, cannot be read into for the purpose of interpretation of who could be a “bidder” in relation to an Indian entity seeking to participate in the bidding process.

24. The Respondent No.1 then relied upon the judgments of the Hon'ble Supreme Court of India in ***N.G. Projects Limited vs. Vinod Kumar Jain and Others reported in (2022) 6 SCC 127, Uflex Limited vs. Government of Tamil Nadu & Others reported in (2022) 1 SCC 165, Central Coalfields Limited & Another vs. SLL-SML (Joint Venture Consortium) & Others reported in (2016) 8 SCC 622, Galaxy Transport Agencies vs. New J.K. Roadways reported in (2022) 5 SCC 362, Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Anr. reported in (2016) 16 SCC 818, Silppi Constructions Contractors vs. Union of India & Anr. reported in (2020) 16 SCC 489*** and Judgment of the Single Judge of the Madras High Court of ***Divya Impex & Others vs.***

State of Tamil Nadu and Others reported in (2016) SCC OnLine Mad 33674.

25. The Respondent No.1 submitted that these Judgments lay down the proposition that the scope of interference of a Writ Court in a tender matter is very limited and ordinarily the soundness of the decision taken by the author of the tender document, in view of the fact that he would be the best person to understand his own requirement, ought not to be questioned in judicial review. It was further contended that mere disagreement with the decision-making process or with the decision of the administrative authority would not be a reason for a Constitutional Court to interfere with the decision, and since in the present case, the entire process followed by the Respondent No.1 was reasonable, transparent and fair, there was no cause for a Writ Court to exercise jurisdiction under Article 226 of the Constitution of India. It was contended that the Petitioner has been unable to demonstrate any arbitrariness in the process of taking a final decision of holding the Petitioner No.3 to be disqualified under the RFP, being a sole proprietorship concern, and consequently, this petition ought to be dismissed.

26. The learned Senior Advocate Mr Nitin Sardessai for the Respondent No.2 submits that a plain reading of the RFP shows that bidders could only be companies and not individuals as has been explicitly stated in Clause 1.1.9 read with the contents of Appendix 1 and Appendix 5 of the tender document. It was further contended that the restrictions imposed by the Ministry of Finance order dated 23.07.2020 ex facie pertains only to foreign entities who rush to participate in the tender and not to Indian bidders; that the GFR order is based upon the Office Memorandum dated 23.07.2020 which inserted Rule 144 (XII) into the GFR of 2017 which itself makes it clear that the purpose for which it was issued was to regulate procurement from foreign bidders and that Indian entities, whether individuals or companies are totally beyond its scope.

27. It is further the contention of Respondent No.2 that since the tender authority has chosen not to import the model clause definition of the word “bidder” into the RFP, the meaning of the term “*mutatis mutandis*” referred to in clause 1.1.8 of the RFP should be interpreted not as being “exactly the same” but rather to be the same, and with necessary changes. It is further their submission that Respondent No.1 having chosen not to incorporate the definition of “bidder” into the RFP, one could not interpret the RFP document to be one that included individuals or firms as being eligible to be part of a consortium that bid in the process.

Reliance was placed on two judgments of the Supreme Court in ***M/s Ashok Service Centre and Others vs. State of Orissa reported in (1983) 2 SCC 82*** and on ***National Highways Authority of India vs. Madhukar Kumar Judgment dated 23.09.2021 in Civil Appeal No.11141/2018*** for the proposition that when the words "*mutatis mutandis*" are deployed with a view to making the provisions of an earlier Act applicable to a later Act, the applicability of the earlier Act to the later Act would be adopted only so far as it is necessary for the purpose and making a change without altering the essential nature of the opinion changed.

28. For the purpose of considering the rival submissions of the parties, it would be of advantage to first consider the case law cited before us. In *N.G. Projects Limited* (supra), the Supreme Court was examining the decision of the Technical Evaluation Committee in declaring the technical bid of an unsuccessful bidder, who had challenged this decision in a writ petition. In that case, the Division Bench of the High Court dismissed the appeals filed by the successful tenderers upholding the decision of the Single Judge, holding that the selection of the successful bidder and rejection of the other was not in consonance with the specific terms of the bid document, nor was on a uniform yardstick.

Whilst referring to various pronouncements of the Supreme Court on the parameters of interference by a Writ Court in the decision-making process whilst awarding a tender of a contract to a party, the Hon'ble Supreme Court has held thus:-

> *"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 malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."*

We take note of the fact that *N.G. Projects Limited* (supra) was rendered in the factual background stated in para 5 of the judgment, where the challenge to the Tender Evaluation Process was taken after the technical bid was declared to be responsive, after the evaluation of the financial bid of the successful bidder, the work contract having been assigned and the work having partly being completed on a substantial part of the proposed road. It is in that set of facts that the Supreme Court was of the view that Courts should not interfere with contracts involving technical issues as there is a requirement of necessary expertise to adjudicate upon such issues, and should relegate, in such facts, the parties to seek damages from wrongful exclusion under the tender process, to normal remedies of a suit.

29. In *Uflex Limited* (supra), the Supreme Court has examined the restrictive scope of judicial review, of examining a tender process and has regarded its conclusions in paras 42 and 43 of the judgment which read as follows:-

> *"42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be*

resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

43. The present dispute has its history in many prior endeavours by the original petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient, obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It does appear to us that this is what is happening; that the two original petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a court ought to play."

The conclusions of the Supreme Court, in this case, were that the Division Bench of the High Court had fallen in error in almost sitting as an appellate authority in matters of evaluating technology and commercial expediency, which was not the role which a Court ought to play. The judgment was rendered on a tender process of evaluation of bids for the production and supply of polyester-based hologram excise labels on a turnkey basis, which evaluation process required scrutiny of highly technical data for which Courts would obviously lack the expertise.

30. *Central Coalfields Limited* (supra) was a case where the Petitioner before the Jharkhand High Court felt aggrieved by a rejection of its bid on the ground that the tender document did not prescribe the format for the bank guarantee and rejection of disqualification of the Petitioner on a conclusion that it had submitted its bank guarantee in a format other than the one prescribed, was arbitrary. Before the Hon'ble Supreme Court, the main issue stated for its decision was whether the company acted perversely enough in rejecting the bank guarantee of the Petitioner on the ground that it was not in the prescribed format, calls for judicial review by a Constitutional Court, to interfere with the decision of the company. In answering this question, the Supreme Court has held 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 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 the 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) in Jagdish Mandal v. State of Orissa 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-, 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.
....
....

....
....

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

31. In *Galaxy Transport Agencies* (supra), whilst considering rejection of the Petitioner's bid in a tender process in the supply of vehicles to the Kashmir police, the unsuccessful tenderer challenged the decision of the evaluation committee. The unsuccessful tenderer was declared as ineligible to bid in the process. In that matter, the work awarded to the successful tenderer was almost complete during the pendency of the petition. Whilst considering the eligibility criterion of bidders, and the interpretation sought to be given by the authority that authored the tender document, the Supreme Court has held as under:-

> *"13. Even a cursory glance at Condition No. 31 of the N.I.T. would show that the 30 vehicles referred to, are "both HMV/LMV". The tendering authority has construed this condition to mean that both types of vehicles, i.e., HMV and LMV, need to be included in the list of the 30 vehicles submitted by each bidder.*
>
> *14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818, this Court held:*
>
>> *"15. We may add that <u>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</u>. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."*
>
> *(page 825)*
> *(emphasis supplied)*"

It is thus clear that generally a Writ Court would not substitute its own interpretation to the one applied by the authority that authors a tender document as that authority is the best person to understand and appreciate its own requirements.

32. *In Afcons Infrastructure Limited* (supra), the Supreme Court sets down the amplitude of the interference of the Constitutional Court in decision-making process in matters of tenders at paras 12 and 13 of this judgment which states thus:-

> *"12. In Dwarkadas Marfatia and Sons v. Port of Bombay it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India 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 as mentioned in Central Coalfields.*
>
> *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.*

33. In *Silppi Constructions Contractors* (supra), the Supreme Court was dealing with a case where the Petitioners' tenders were rejected on the contention that its sister concern had received adverse remarks as a contractor registered with the Union of India. At para 20 of its judgment, the Hon'ble Supreme Court holds thus:-

> *"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."*

34. *In Divya Impex* (supra), a Single Judge of the Madras High Court, whilst dealing with a challenge to the tender document itself, which imposed a condition of a technical specification for a bidder, that it was required to be a company registered in India under the Companies Act, 1956/2013; the Petitioners being either partnership firms or sole proprietorship concerns were obviously not eligible and had challenged the qualification clause in the tender document by way of a writ petition.

Whilst dealing with the scope of judicial review by a Constitutional Court, of a condition imposed qualifying a bidder in a tender process, the Madras High Court has considered whether the terms of the invitation to tender can be open to judicial review, and whether the challenge to the very qualification clauses in the tender document, would amount to interference with the scope of the contract that the authority seeks to enter into.

At paras 23 and 24 of the judgment, it holds thus:-

"23. The Court does not have the expertise to correct the administrative decision. The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. Such decisions are made by experts. In view of the nature of the work, the qualifications or eligibility criteria prescribed by the 2nd respondent cannot be said to be unreasonable or discriminatory.

> *24. It is the prerogative of the Tender Calling Authority to impose pre-qualifying conditions in the tender process and therefore, the petitioner has no right to question the fixing of pre-qualification as the respondents have got every right and power to fix the pre-qualifications to suit the standards and performance of the materials to be produced. While issuing the tender notification, the procedure contemplated under the Tamil Nadu Tender Transparency Act, 1998 and the Rules made thereunder were followed by the respondents and no hideouts were played. Therefore, the contentions of the learned Senior Counsel for the respective petitioners that with malafide intention, the eligibility criteria has been stipulated cannot be sustained. As such, the petitioners have not made out any ground which warrants interference by this Court with the conditions stipulated in the General Terms and Conditions of the tender notification dated 11.12.2015. For the foregoing reasons, all the above Writ Petitions deserve to be rejected. Accordingly, all the Writ Petitions are dismissed. No costs. Consequently, the connected miscellaneous petitions are closed. ”*

35. A reading of some of the above judgments leaves no doubt that whilst examining matters of a tender process, a Writ Court in its powers of judicial review would confine itself to the following questions of legality of the decision-making process and not of the actual decision taken by the authority;

a. That if the contract which is subject matter of the tender process is of highly technical nature, which involves the requirement of necessary expertise to adjudicate upon some issues, a Writ Court would exercise complete restraint in proceeding to examine the evaluation process.

b. That in matters which may not be of technical nature, but would involve the plain interpretation of a clause or eligibility in the tender document, a Writ Court would, in normal course accept the interpretation given to the clauses by the author of the tender document, who is the best person to understand and appreciate its own requirements.

c. That the judicial interpretation of a contract in the sphere of commerce stands on a distinct footing from that while interpreting statutes;

d. That mere disagreement with the decision-making process is no reason for interference by a Constitutional Court and the threshold of malafides, intention to favour a particular party, arbitrariness, irrationality or perversity must be met, before a Writ Court can interfere with the decision-making process or the actual decision.

We now proceed to examine the tender document i.e. RFP in the light of the above principles of law laid down by the Hon'ble Supreme Court of India.

36. There is no dispute that the RFP does not define the word "bidder" in any of the clauses of the document. There is also no dispute on the fact that the Respondent No.1, being a Port Authority established under the Major Port Trust Act and under the control of the Ministry of Shipping, Government of India, the provisions of the General Financial Rules, 2017 (GFR) are made fully applicable to the authorities functioning, more so in the areas of procurement of goods and services.

37. Rule 144 of the GFR sets down the fundamental principles of public buying of goods and services and prescribes for a fair, transparent and reasonable procedure in such procurement processes. The GFR themselves do not distinguish between various entities that may be eligible for participating in a bid process that is, individuals, corporates, firms or consortiums or a combination of any of these.

38. In the present case, clause 1.1.7 invites bids from a qualified "firm" for operations and maintenance of its international and domestic cruise terminals and ferry terminals at Mormugao Port on a PPP basis to operate, manage and maintain these terminals in accordance with the Operation and Management Agreement.

39. Clause 1.1.8 stipulates that the Respondent No.1 intends to qualify and select bidders for an open competitive bidding process set out in the RFP document.

In this clause, the word “bidder” includes “Member of the Consortium”, thereby meaning that any member of a consortium would be eligible to be referred to as bidder and bid in the tender process.

In this clause, there is a reference to an order dated 23.07.2020 of the Ministry of Finance which was attached as Appendix XIII to the RFP document. The order dated 23.07.2020 which was issued under the GFR further qualifies that bidders from a Country which share a land border with India would be eligible to bid in the tender process only if that bidder was registered with the competent authority. The clause further stipulates that the contents of the GFR order shall apply *mutatis mutandis* to the bidding process and the bidders must satisfy themselves that they are qualified to bid in terms of the order dated 23.07.2020.

40. Before adverting to the remaining clauses of the RFP document, on a plain reading of the entire Clause 1.1.8, it can be safely concluded that a bidder from a company who shares a land border with India in terms of the GFR order applicable to the Respondent No.1 in a bidding process, is not excluded from bidding in the tender process.

41. Further reading of the order dated 23.07.2020 of the Ministry of Finance would reveal that Clause 6 of the order, defines the word “bidder” which includes the term tenderer or service provider and means any "person" or "firm" or "company", including a member of a consortium or joint venture of several persons, firms or companies, and every artificial juridical person not falling in any of the descriptions of bidders stated in the definition. A plain reading of the definition of the word "bidder" in relation to the order of the Ministry of Finance dated 23.07.2020, therefore, does not restrict the participation of an individual or a firm or a combination of individuals and corporate bodies forming a consortium from a country other than India, which shares a land border with India. It is further clear from a reading of this order that on a plain reading of the tender document of Clause 1.1.8 which incorporates order dated 23.07.2020 of the Ministry of Finance, individual bidders of foreign countries sharing a land border with India could compete with bidders from within India in the tender process under the RFP.

42. The interpretation finally arrived at by the Board of the Respondent of the tender document by which the Respondent has rejected the bid of the Petitioner No.3 as part of a consortium which includes the Petitioner Nos.1 and 2 as being disqualified and unresponsive was that the consortium was formed with an individual Indian as its member, and notwithstanding the fact that an individual bidder from a foreign country which shares land borders with India was eligible to bid, but such an Indian individual was disqualified.

The moot question before us is, therefore, whether there is any arbitrariness in the process followed by the Respondent No.1 is arriving at this interpretation of the RFP document and disqualifying the Petitioners from the bidding process

43. A further perusal of the RFP, more specifically Clause 1.1.9 thereof, which would apply only after a bidder is selected on his technical and financial bids being accepted, such a bidder is a company or group of companies, referred to in that clause as a “consortium”. A reading of Clause 1.1.9 would stipulate that a bidder who is either a company or a group of companies (referred to as “consortium”), if selected after acceptance of the technical and financial bid, would be required to incorporate itself into a “Special Purpose Vehicle” (SPV) who would be the operator in relation to the Operations and Management Agreement to be entered into with the Respondent No.1. There is no other clause in the introductory part of the RFP with reference to a bidder being only a company or a group of companies. This Clause 1.1.9, would come into operation only after a bidder is found to be qualified both technically and financially and is the “selected bidder” for the purpose of entering into the contract. A plain reading of this clause would clearly mean that it would apply only after the selection process of the bidder is complete and it stipulates that such a selected bidder would be required to form a Special Purpose Vehicle (SPV), which is the entity that would enter into the actual contract with the Respondent No.1.

The clear intention and import of Clause 1.1.9, therefore, could only be to specify in advance the conditions, that whoever was the selected bidder, whether an individual, a firm or a company, would not have the right to execute the O & M Agreement or contract for operating the terminals, but would be required to form a company (SPV) of which the selected bidder would be a part of, which SPV would be set up for the exclusive purpose of entering into and working the contract of operating, maintaining and managing the cruise terminals.

In our opinion, therefore, a plain reading of Clause 1.1.9 would make this clause applicable, to an entity to be formed in future, which is the Special Purpose Vehicle, which would enter into the contract, and that clause would not have any operation and apply or set down any qualification for a bidder, who would participate in the initial technical bid stage of the tender.

44. Clause 2 of the RFP deals with general terms of bidding and instructions to bidders. Clause 2.1.1 thereof specifies that no bidder shall submit more than one bid for the project. It further specifies that such a bidder applying individually or as a member of a consortium, shall not be entitled to submit more than one bid either individually or as a member of any consortium.

There is no ambiguity on the plain meaning of this clause, which, as would be understood by any normal prudent person, would mean that a bidder applying individually could present only one bid; similarly, an individual bidder applying as a member of a consortium would also be allowed to submit only one bid.

45. Clause 2.1.5 of the instructions to bidders in the RFP requires the bid to be furnished in the format which is at Appendix I (Annexure A), known as the "Letter for Bid". The format of the letter for a bid also refers to the words "I" and "We" meaning thereby even the format under Appendix I for placing the bid before Respondent No.1 referred to either an individual person or a group of individuals or a corporate entity.

Clause 17 of the format for submission of the letter for bid under Appendix I requires the bidder to specify his understanding that in the event that he is selected, he shall incorporate a company under the Indian Companies Act, 1956/2013 prior to the execution of the Operation and Management Agreement. This clause of the format for submission of the bid also leaves no doubt that there was no precondition for a bidder to be a company but there was an undertaking required from a bidder that in the event his bid was selected, the individual or group of individuals would incorporate themselves into a company prior to the execution of the O & M Agreement, and enter into the contract for maintenance and operation of the terminal as a corporate entity. This clause of the format of the letter of bid read with the introductory conditions contained in Clause 1.1.8 read with Clause 1.1.9 leaves no doubt in our mind that the RFP contemplated entering into a final contract only with a corporate body which was to be registered as a Special Purpose Vehicle for exclusively entering into a contract of operation and maintenance of the terminal, but did not prohibit individuals from participating in the bid process.

Our view in that regard is further strengthened by a reading of Clause 19 of the format for the letter of bid which also refers to the words "<u>My</u> being declared as the selected bidder" and <u>I</u> agree to enter into an O & M Agreement in accordance with the draft that has been provided to <u>me</u>". These words signify that an individual was not prohibited from participating in the bid process, provided he undertook and agreed to enter into the O & M Agreement in accordance with the draft that has been provided. Similarly, Clause 32 of the format of the letter of bid also refers to the bidder as an individual, who has to certify that he is not from a country that shares a land border with India, alternate to which, if such an individual bidder is in fact from a country which shares a land border with India, he was registered with the competent authority in terms of the order dated 23.07.2020 of the Ministry of Finance referred to in Appendix 13 of the RFP.

46. We then proceed to examine Clauses 2.2 and 2.3.1 of the RFP which deal with changes in the composition of the consortium or/and the lock-in period and change in ownership of the bidder. Clause 2.2.1 specifies that “consortium” can have a maximum of three members while Clause 2.3.1 specifies that by submitting a bid, the bidder acknowledges that in case it is a single entity, it shall be required to form an SPV/Operator to execute the O & M Agreement, and such bidder shall hold at least 51% of the issued and paid-up equity of the SPV. This again, is a clause that requires the bidders undertaking, that if he were an individual, he would be part of a consortium which would have to register itself as a Special Purpose Vehicle and in which he would hold 51% of the equity in the Special Purpose Vehicle. It is not the case of the Respondent No.1 that the Petitioners had not complied with all the declarations that were required to be made in the format in terms of Clause 2 and its provisions under the RFP. There is, therefore, no dispute that the three bidders as a consortium had given the necessary undertakings that they would form themselves into a Special Purpose Vehicle, being a corporate entity, registered under the Companies Act in conformity with Clauses 2.2 and 2.3.1, through which they would enter into the contract with the Respondent No.1, were they to be selected as the final bidder.

47. We then come to the process of submission of the technical bid which is set out in Clause 2.11.5 and the submission of the financial bid under Clause 2.11.6. The affidavit of the Respondent No.1 has also not raised any objections to the form in which the technical bid and the financial bid is submitted by the Petitioners.

Clause 3.2, forming part of the evaluation process of the bids requires that prior to the evaluation of the bids, the authority shall determine whether each bid is responsive to the requirements of the RFP. It specifies that the bid would be considered responsive only after it had satisfied the various conditions set out in Clauses I and X of Clause 2.3.1.

48. These clauses are required to be read with the conditions of the “Joint Bidding Agreement” specified in Appendix V which is referred to in Clauses 2.2.4 and 2.11 of the RFP, which is required to be executed by a bidder that consists of a consortium such as the Petitioners.

It is only in this form that the parties to a consortium are referred to in the format as limited companies. However, a note may be taken that the Joint Bidding Agreement formed would equally apply to those bidders who may be individuals or firms, other than corporate entities, as would be permitted under the order dated 23.07.2020 issued by the Ministry of Finance with respect to foreign individuals from a country sharing a land border with India.

It, therefore, stands to reason that the format of setting up a consortium as stated in Appendix 4 would not strictly mean that corporates registered under the Companies Act would be the only qualified bidders if they were Indian companies submitting a bid.

49. In the same Appendix V, the format of the Joint Bidding Agreement for consortiums contains Clause 3 which stipulates an undertaking from the parties to the consortium and their declaration that if they are selected as bidders, they would incorporate an SPV under the Indian Companies Act, 2013 in accordance with the bidding document; of the application as an operator in terms of the O & M Agreement. Clause 6 of the format of the Joint Bidding Agreement specifies that the consortium agrees that the proportion of the shareholdings amongst the parties in the SPV to be formed would be subject to the terms of the O & M Agreement and that the lead member of the SPV shall, during the term of the O & M Agreement, hold not less than 50% of the consortium holdings in the paid-up equity capital of the operator.

In this case also, in the affidavit of the Respondent No.1, there is no statement made that the Petitioners have not conformed to the requirements of the Joint Bidding Agreement.

50. Having read all the aforesaid clauses of the RFP in conjunction, and having read the specific conditions in the introductory clauses, instructions to the bidders under Clause 2 thereof in relation to the various Annexures and formats required to be submitted, as also read the same in conjunction with the model clauses under Annexure 3 to the RFP read with the General Financial Rules, 2017 (including office order dated 23.07.2020 issued thereunder), the only conclusion that we would arrive at is that there would be no disqualification of an individual person forming part of a bidding consortium, from India or from a foreign country sharing a land border with India to be disqualified from the bidding process of the RFP.

51. We now make specific reference to the process followed by the Respondent No.1 at coming to its conclusion that the Petitioners were disqualified as a consortium, their technical bid being unresponsive for the sole reason that Petitioner No.3 was an individual member of the consortium, and the RFP required only corporates to be bidders or to form a bidding consortium.

52. The events which have led to the final decision by the Board of the Respondent No.1 are culled out from the affidavits and the documents on record, recorded at para 18 of this judgement. If one analyses the process undertaken by the Respondent No.1 during the course of opening the technical bids, the following facts are clear from the record:

A) The RFP was drafted and authored by the Transaction Advisors M/s Feedback Infra Private Limited, who acted as consultants to the Respondent No.1. On receipt of the technical bids, it was the Transaction Advisor who first evaluated the technical bid and the eligibility of three bidders in the fray on 04.08.2022 and gave a specific opinion that there was no disqualification for a natural person or a sole proprietorship as a legal entity to be considered as an eligible bidder. Having given this opinion, it was placed before the Tender Evaluation Committee.

Thereafter, the Tender Evaluation Committee appears to have deliberated over the advice of the Transaction Advisors, who were actually in the best position to state on behalf of the Respondent No.1 the real intention of the RFP, as to whether individual bidders were barred from the tendering process, they being the authors of the RFP document. However, the Tender Evaluation Committee opined otherwise and according to Clause 14.7 of the minutes of the tender committee meeting of 30.12.2022, an opinion was recorded that the stand taken by the Transaction Advisor allowing for bids of individuals as being eligible was not acceptable to the Committee.

We note that there are no reasons cited in the minutes or in the document before us or even in the affidavit of Respondent No.1 as to why the Tender Evaluation Committee or on what basis it opined that individuals were not eligible to bid. In fact, there is no reference at all to the RFP or its various clauses in the minutes of the Tender Evaluation Committee to substantiate its difference of opinion and how its disagreement with the opinion of the Transaction Advisors led to requesting for an opinion of the Advocate of the Respondent No.1.

53. We then note from the contents of the proceedings of the Tender Committee Meeting that on 22.09.2022, after obtaining the opinion of Mr Yogesh Nadkarni, Advocate for the Respondent No.1, which stated that individual bidders were not eligible, the Chairman of the Respondent No.1 sent a letter dated 22.09.2022 to the concerned Ministry which then directed the Respondent

No.1 to take appropriate action at its own level vide letter dated 11.11.2022.

This course of action further belies the doubts we had, in the light of the opinion of the Tender Evaluation Committee on the correct interpretation of the RFP, that in our opinion there was no room for interpreting otherwise than in the manner that the Transaction Advisor had already opined.

It appears that thereafter the Board resolved to take a second legal opinion of a retired Supreme Court Judge or a High Court Judge as to whether individuals were eligible to bid if they were residents of India. Here again, the entire process has led us to believe that the Respondent No.1 was on one ground or the other attempting to build up a case by obtaining contrary opinions to the one expressed by the author of the RFP, the Transaction Advisors to disqualify the Petitioners from being accepted as bidders. On 07.12.2022, an opinion of Justice F.M. Reis, a retired Judge of this Court was received by the Respondent No.1, also opining that the Respondent No.3 does not meet the eligibility criterion. With this opinion on record, a final technical evaluation report was submitted by the very same Transaction Advisor who had earlier opined that the RFP did not prohibit acceptance of a bid of an Indian individual or sole proprietorship concern, now opining that in view of the legal opinion received by the Respondent No.1, a sole proprietorship bidder forming part of a consortium, did not meet the basic eligibility criterion provided under the RFP. With this contrary opinion, the Petitioners' technical bid was considered non-responsive along with that of the Respondent No.3. Report dated 28.12.2022 was then submitted to the Tender Committee.

54. Scanning through the events recorded above, it becomes all too clear that at no point of time was the Respondent No.1 decisive from the inception as to the eligibility of persons that it was ready to accept as bidders, and the entire process adopted to reject the bids of the Petitioners and Respondent No.3 was based upon, not its own opinion but that of the legal advisor. From this itself, it is clear that the Respondent No.1 had no desire of its own, whilst drafting the RFP, to specifically exclude any individuals, sole proprietorship concerns or firms, and only desired corporate entities, which were based in India to be bidding in the RFP. This fact is all too evident from the events that took place until 30.12.2022; in the affidavit of the Respondent No.1 there is no specific averment that it was clearly the intention from the inspection and from the stage of drafting the RFP, that the Respondent No.1 desired to exclude any individual or sole proprietorship concern from a bidding consortium and was desirous of dealing only with Indian corporate entities as bidders. The affidavit is also silent as to how the Respondent No.1 would deal with the issue of having created two classes of bidders, the first being only for corporate entities from India as against individuals or sole proprietorship concerns or firms or corporates based in countries with neighbouring countries having a land border with India as allowed by the Office Memorandum dated 23.07.2022 of the Ministry of Finance under GFR.

55. Rule 144 of the GFR 2017 sets down the fundamental principles of public buying of goods and services, one of which is the fair and equitable treatment of suppliers, and promotion of competition in public procurement. Rule 144 being applicable to the entire tender process, commencing from the drafting of the tender document, which is the RFP and qualification of the bidders, required the RFP to equitably treat all the bidders and to promote competition amongst them on an equal and level playing field. This being the intent of the Rule, we would be required to read the qualification clauses for bidders in the RFP in consonance with the intent of Rule 144, which is admittedly applicable to the Respondent No.1 whilst conducting any tender process for outsourcing its services.

Applying this principle, we are of the opinion that on a plain reading of the aforementioned clauses of the RFP read with the object of Rule 144 of the GFR 2017, the tender document was not intended to exclude Indian individuals or sole proprietorship concerns from the bidding process, whilst simultaneously allowing foreign individuals and sole proprietorship concerns to be eligible to bid, being from countries sharing land borders with India, as contended in the order dated 23.07.2020 amending GFR 144 to include such foreign individuals as being eligible to bid.

56. Rule 163 of the GFR 2017 stipulates that the two-bid system requiring the receipt of a separate technical and financial bid is required to be followed and under Rule 164, the two-stage bidding contemplates the evaluation first of the technical bid and after shortlisting the bidders, requires the opening of the financial bid.

57. Rule 168 of the GFR 2017 specifies the contents of a bidding document which are required to be shown chapterwise.

A conjoint reading of Rule 144 with Rules 163 and 168 would stipulate that there is no prohibition on an individual bidder or a sole proprietorship or a firm or company/body corporate or a consortium consisting of any of these combinations from the bidding process.

58. Adverting once again to the process followed at arriving at the impugned decision, with reference to the GFRs. quoted above, a reading of Clause 1.1.8 of the RFP does not exclude a sole proprietor or an individual or a firm from the bidding process nor does it specifically state that only companies, body corporates or a consortium whose members consist of companies, could be the sole eligible bidders. A reading of Clause 1.1.8 as it stands, would allow for bidding in a competitive process through a sole proprietor or a corporate or a consortium from India. The second part of Clause 1.1.8 qualifies that bidders from countries who share a land border with India would also qualify for bidding in terms of the GFR order dated 23.07.2020 which would apply *mutatis mutandis* to the bidding process, provided such bidders, (in which sole proprietors and individuals have not been excluded) satisfied the conditions of registration with the appropriate authority and other conditions laid down in Appendix XIII.

59. We now advert to the process followed by the Respondent No.1 in evaluating the technical bid of the three bidders including the Petitioner No.3.

After the Transaction Advisor had opined that a natural person/sole proprietor who was a legal entity could be considered as an eligible bidder, on a conclusion recorded by the tender committee in its meeting at internal page 13 of its meeting dated 30.12.2022 on a conclusion premised by the Transaction Advisor, that the RFP document <u>does not specifically bar any entity, be it a</u>

“natural person”, sole proprietorship” or a “company”, the tender committee considered this advice in the minutes of the meeting recorded on 30.12.2022 of the tender committee on this issue, the deliberations are recorded at internal page 17 thereof where there is no deliberation of whatsoever nature recorded on the various clauses of the RFP.

At internal page 20 of these minutes, the tender committee states that its opinion was to place before the Board of the Respondent No.1 the following discussion:-

> “*(A) Whether to accept the single responsive bid of M/s. J M Baxi Ports & Logistics Limited, and open their Price bid and treat the bids of M/s/ Sanjay Construction Co and M/s. Shree Sukhsagar Hospitality Services, Mumbai (JV) with M/s. Shinde Developers Pvt. Ltd non-responsive and not to open their price bids.*
>
> *Or*
>
> *(B) To discharge the subject tenders and call for fresh tenders, duly taking necessary action in respect of the bidder, M/s. J M Baxi Ports & Logistics Limited, as per Tender terms and conditions, by the Department.*”

60. The upshot of the discussion and recommendation of the tender committee as can be culled out from its minutes was that the tender committee came to No decision on the eligibility of the Petitioners and only recommended to the Board of Directors a choice of decisions, the first being whether the Board would accept the bid of the Respondent No.2 as being responsive and treat the bid of the Petitioners and that of the Respondent No.3 as being non-responsive, and in the alternative, whether to take a decision of discharge the tender and call for a fresh tender taking necessary action in respect of the Respondent No.2 for non-disclosure of criminal cases pending against its Directors. The minutes of the meeting do not record the independent decision of the Tender Evaluation Committee to reject the Petitioner No.3 as being ineligible, on the examination of the clauses of the RFP and interpreting that they debarred the sole proprietorship concern from the bidding process. We note that if the Respondent No.1 in fact desired to exclude individual persons or sole proprietors from bidding, its RFP would state so in clear terms.

61. There was yet another Tender Evaluation Committee meeting held on 24.01.2023 in continuation of the earlier meeting held on 30.12.2022 placed at Annexure 20 at page 226 of the petition in which the deliberations are recorded at internal page 5 of the minutes. A reading of the deliberations would reveal that yet again, there was no decision taken on the basis of any discussion on the various clauses of the RFP to conclude that the RFP in fact disqualified the sole proprietorship from bidding. In these minutes, the earlier recommendations of the Board were reiterated, requesting approval to consider the bid of the

Respondent No.2 as responsive and to open its price bid and consider the bids of the Petitioner No.2 and the Respondent No.3 as non-responsive. These recommendations are not based upon any reasoning or discussion on the various clauses of the RFP document or of the GFR 2017.

62. We then turn to the various deliberations of the Board of the Respondent No.1; all that the minutes' records are the chronological facts which are stated by us in the preceding paragraphs, and no more. Even the Board of Directors records at Clause 14.3 of the minutes that all three bidders' price bids being in possession of the Respondent No.1 along with the technical bid, “as per the directions of Ministry, Committee recommends to consider the bid of J M Baxi Ports & Logistics Limited (Respondent No.2) as responsive and open their price bid and other two bidders are considered as non-responsive”. The Board accordingly treated this consideration as the final resolution and rejected the Petitioners' bid.

We do not find any deliberations of the Board considering the various clauses of the RFP and the General Financial Rules, 2017 applicable to the process. There is neither reasoning nor consideration of the essential facts and contents of the clauses of the RFP by the Tender Evaluation Committee and by the Board of Directors of the Respondent No.1, which is also very clear from a reading of the response of the Respondent No.1 in its affidavit where no clear stand has been taken of the decision-making process, we opine that the decision taken to treat the bid of the Respondent No.2 as being responsive, and that of the Petitioners and Respondent No.3 as being unresponsive, was arbitrary and appears to be based on extraneous inputs and with a view to disqualify the Petitioners at the technical bid stage in order that the Respondent No.2 would be left in the fray as the sole bidder.

As noted by us at Para 13 and 14 above, after having now disclosed that the financial bid of the Respondent No.2 as Rs.67,45,78,579/- while that of the Petitioner No.3 as almost three times higher at Rs.1,65,13,68,361/-, the revenue loss that would be suffered by the Respondent No.1 is obvious.

63. We have to be mindful of the fact that at no point of time did the Respondent No.1 feel that the Petitioner No.3, as a bidder, was not competent to perform the O & M contract. This can be easily deciphered from what is stated in the proceedings of the tender committee of 30.12.2022 at page 10 thereof, where it considers the competence of the three bidders and finds nothing adverse against the Petitioners either in terms of their submission of all the requisite documents and disclosures or in their competence to carry out the contract. So also in the opinion of the Transaction Advisor and financial consultant to Respondent No.1 which is recorded at Clause 'A' of page 13 of the same minutes, the Petitioner No.3 as a sole proprietorship concern was considered eligible to bid. In the affidavit of the Respondent No.1, there is no objection taken to the qualification of the Respondent No.3, either financially or otherwise to be a bidder, and the only reason for concluding that Petitioner No.3 was disqualified appears to be based upon opinions which the Respondent No.1 obtained from external sources.

A point to be noted on perusal of this affidavit is that it is nowhere the case of the Respondent No.3 or the stand taken by it that right from the inception, before the RFP tender document was drafted or thereafter, its intention was always to disqualify the Indian individuals, proprietorship concerns or firms from the bidding process and it only desired companies or a consortium of companies to bid in the RFP. It clearly appears from a reading of the affidavit and the various minutes of the meetings placed before us that from the inception, it was never the intention of the Respondent No.1 to exclude Indian individuals or sole proprietorship concerns or firms from the bidding process and to only allow such individuals from foreign countries sharing land borders with India to be eligible bidders in the process. Clearly, the Respondent No.1 over various meetings and its Technical Evaluation Committee created a case by eliciting opinions from external agencies to disqualify the Petitioners and the Respondent No.3 from the bidding process.

64. *N.G. Projects* (supra) cited by the Petitioner was rendered in the fact situation where the successful bidder was issued the work contract, work commenced, and was substantially completed on the proposed road after the successful bidder had mobilized plant and machinery. The Petitioner in that case filed the petition after the work order was issued and just prior to its commencement. It was noticed in that case that the work had commenced and a large part of it had been executed and been completed whilst the matter was pending before the High Court. Despite this situation, the High Court concluded that the selection of the successful bidder was not in conformity with the standards laid down. It is in that light that the Hon'ble Supreme Court has held at para 23 of that judgement that Courts should be reluctant to interfere with contracts involving technical issues.

The fact situation in the present petition is quite different from that recorded in N.G. Projects (supra). Apart from this fact, the decision-making process in the present case does not concern any technical inputs or complexities and was to be arrived at on a plain reading of the clauses of the RFP and the General Financial Rules, 2017.

65. In *Uflex* (supra), the Supreme Court makes reference to the applicability of the Wednesbury principle being applied to test the decision of the authority disqualifying the tenderer and states that the decision if found to be so arbitrary and irrational that it can never be that any responsible authority acting responsibly and in accordance with law would have reached such a decision as required to be applied in such cases.

In that case, the Court was dealing with the choice of a bidder in a matter of a highly technical nature that the decision of the authority was based upon expert opinion on who would be suited to supply the best service. In that set of facts, the Supreme Court was of the opinion that the High Court had fallen in error in almost sitting as an Appellate authority on technology and commercial expediency which is not the role a Court ought to play.

Unlike the facts stated in *Uflex Limited* (supra), we are not called upon to embark into any technical aspects of the contract or its commercial expediency but are called upon to examine the fairness of the decision-making process and whether the RFP left any possibility in the interpretation of its clauses, on their plain reading read with the General Financial Rules, to disqualify the Petitioners from the bid process.

66. In fact, none of the judgements cited before us by the Respondents, deal with the fact situation of the kind before us, where the Courts were called upon to test the decision-making process on the interpretation of a document.

67. On applying the Wednesbury principle to the interpretation of the tender document (RFP), who are unable, from a plain reading of its clauses, to come to any other conclusion that it excludes a sole proprietorship concern or individual or sole proprietorship constituents of a consortium, who are from India, from bidding in the RFP. Applying the Wednesbury test to the interpretation of the document, any prudent man would conclude that there was no disqualification of such entities from the bidding process.

68. Under these circumstances, and for all the reasons stated above, we are of the opinion that the process followed by the Respondent No.1 relating to the RFP for operations and maintenance of the international and domestic cruise terminals and ferry terminal at Mormugao Port at Goa, treating the Petitioners as disqualified under the technical eligibility criterion was arbitrary, irregular, contrary to the clauses contained in the RFP read with the General Financial Rules of 2017, and therefore, in violation of Article 14 of the Constitution of India.

We are, therefore, of the opinion, that the Petitioner No.3 and consequently the consortium of the Petitioners was eligible under the technical bid and qualified to be considered for the technical bid and consequently their financial bid was required to be opened and considered by the Respondent No.1, which if found to be the best bidder to the RFP, the award of the contract for the operations and maintenance of the international and domestic cruise terminals and ferry terminal at Mormugao Port at Goa on a public-private partnership (PPP) mode. We hereby declare the same accordingly.

69. For these reasons, we quash and set aside the decision of the Respondent No.1 dated 02.02.2023 to treat the Petitioner as disqualified under the technical eligibility criterion to the RFP and direct the Respondent No.1 to treat the Petitioners as qualified bidders and open the financial bid of the Petitioners. In the event that the Petitioners have offered the highest financial bid, they shall be awarded the contract for operations and maintenance of the international and domestic cruise terminals and ferry terminal at Mormugao Port at Goa.

70. We make Rule absolute in terms of prayer clauses (a) and (b) in terms of what is stated above. Considering the circumstances of the case, there shall be no order as to cost.

VALMIKI SA MENEZES, J. **DHIRAJ SINGH THAKUR, J.**

JOSE FRANCISCO DSOUZA

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