

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

Date of decision: 14th MARCH, 2023

IN THE MATTER OF:

+ **LPA 325/2021 & CM APPLs. 31783-84/2021, 40831/2021, 45191/2022, 5624/2023**

SHIV AND SONS & ANR.

..... Appellants

Through: Ms. Malvika Trivedi, Sr. Advocate
with Mr. Akshat Bajpai, Ms. Ishanee
Sharma, Mr. Shobhit Trehan, Ms.
Sujal Gupta and Mr. Shailendra
Slaria, Advocates.

versus

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LTD (IRCTC)

Respondent

Through: Mr. Harshit Agarwal, Advocate.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant appeal has been filed under Clause X of the Letters Patent Act assailing the Order dated 06.09.2021 passed by the learned Single Judge of this Court in W.P.(C) No. 9197/2021 (*hereinafter referred to as the "Impugned Judgment"*) wherein the prayer of the Appellants herein seeking, *inter alia*, quashing of the letter dated 17.08.2021 issued by Indian Railway Catering and Tourism Corporation Ltd. ("IRCTC"), i.e. Respondent, whereby the Appellants herein were directed to strictly abide by the tender conditions, was rejected

2. The facts, in brief, leading to the instant appeal are as under:
- a) It is stated that in wake of the COVID-19 pandemic and the consequent lockdown, a letter dated 29.07.2020 had been issued by the Respondent stating that licence fee would be collected at the existing rates only after normalization of railway services and this normalization would be considered from the date when 100% of RSD & M/E trains start operating again.
 - b) Noting the increase in number of trains and passengers, *vide* letter dated 08.04.2021, the percentage of reduced licence fees for Operating Static Units (OSU) was revised from 20% to 30% of the quoted licence fee from 08.04.2021 for a period of three months. However, as the number of COVID-19 cases increased, *vide* letter dated 20.04.2021, the Respondent reviewed the upward revision of percentage of reduced licence fees and cancelled/reversed the same.
 - c) Tenders for Operation, Maintenance and Provision of Catering Services through Jan Ahaars (kitchen units)/Refreshment Rooms for a period of five years pertaining to the different zones of the Respondent, i.e. North, South, East and West, were floated in January-February 2021. It is stated that the Appellants herein were allocated units in the West Zone at Chhatrapati Shivaji Maharaj Terminus (CSMT) JA, Bhusawal RR, Solapur JA, Bandra RR, Nagpur JA, Bhusaal JA & Akola RR, and the East Zone at New Tinsukia RR, DDU (Mughalsarai) JA & Rourkela RR.
 - d) It is stated that *vide* letter dated 11.06.2021, the Respondent issued a clarification regarding submission of licence fee for

ongoing tender processes and stated that there would be no relaxation of terms and conditions forbidders who had participated in tenders awarded post 23.03.2020 and were aware of the COVID-19 pandemic. This decision was sought to be reviewed by the South Zone, North Zone and South Central Zone. *Vide* letter dated 23.07.2021, the Respondent stated as follows:

***“2019/IRCTC/Catg./PolicyInstruction/02Dated:
23.07.2021***

***Group General Manager
NZ, EZ, WZ, SCZ & SZ
IRCTC***

Sub: Issue raised by Zone towards guidelines issued CO.

***Ref: 1. CO letter No.2018/IRCTC/CO/Static/EZ Corres
dated 11.06.2021
2. NZ letter No. 2020/IRCTC/ NZ/LCS/Tendering
dated 15.06.2021.
3.SZletterNo.IRCTC/SZ/ZO(Catg)/36/2021/ZO/S
Z/OT-RR&.JA dated 17.06.2021.
4.SCZ letter No. IRCTC/SCZ/1/FP-
FFU/Tendering/2021 dated 30.06.2021.***

Vide CO letter dated 11.06.2021 instructions were issued to Zones that no relaxations are to be extended in any case. In this regard, SZ. NZ & SCZ has requested to review the decision given on 11.06.2021 so that the tender already floated may be executed without any dispute.

The matter has been examined at CO and following have been decided by competent authority:

All tender terms and conditions are sacrosanct and cannot be altered. However to bring down the controversy, an option Hon' ble exit may be given to the service provider who is not ready to operate.

a. Instructions issued vide CO letter dated 11.06.2021 will be followed with prospective effect i.e. for tenders invited post 11.06.2021.

b. For tenders invited between 23.03.2020 and 10.06.2021 following is to be followed:

i. All benefits, as detailed in respective tender documents, may be extended to licensees where such (dispensation) clauses are incorporated in tender document, subject to instructions/directions issued by Corporate Office from time to time.

ii. No benefits to be extended to licensees where no such clauses are incorporated in respective tender documents, However, as seems from the representations of the licensees communicated by zones, bidders might have misunderstood and has quoted in presumption that benefits will be extended, all such licensees, who desires so, may be given honourable exit from the contract.”

- e) It is stated that according to letter dated 23.07.2021, any relaxation as such was incumbent upon clauses already incorporated in the respective tender documents and that the benefits would not be extended to all licensees. The letter stated that all the tender terms and conditions were sacrosanct and could not be altered. Further, an option of honourable exit was given to those service providers who were not ready to operate.
- f) It is stated that the Appellants through representations dated 26.07.2021 and 04.08.2021 requested the Respondent to allow

reductions in licence fee to the newly allotted catering units in the West and East Zone on the ground of the COVID-19 situation and that the not allowing the reduction of licence fee would be arbitrary, thereby infringing Article 14 of the Constitution of India. It was further stated that the bidders had participated in the tenders assessing sales from General coaches whose passengers account for 60% of the sales, and that until and unless General tickets sales were not started, it would not be viable to run units at 100% licence fee. A similar letter dated 09.08.2021 was sent by the General Manager, West Zone, IRCTC, to the Additional General Manager, IRCTC, New Delhi, suggesting for extension of relief to the Appellants in wake of the COVID-19 pandemic.

- g) *Vide* letter dated 17.08.2021 issued by the Respondent, the request of the Appellants was rejected with the following observation:

“2020/IRCTC/CO/Static/IRCA Corres 17.08.2021

***M/s Shiv & Sons
Pandey House, Adjacent Godriwala Dham,
Suraj Ganj, Itarsi (M.P.)***

Sub: 1. Request to allow Reductions in license fee as well as passing other benefits to the newly allotted Catering Units (Allotted after Nation-wide lock down on 22.03.2020) by IRCTC West Zone & East Zone during covid periods.

2. Request to withdraw/modify instructions issued regarding review of license fee of new catering units like RRJA etc. allotted after

nationwide lockdown & not allowing reduction in Quoted license fee as given to previous allotted Catering Units.

Ref: Your letter dated 26.07.2021.

Vide above referred letter, request has been made by you for managing the newly awarded units on reduced license fees.

In this regard, it is to be noted that the above matter has been examined at appropriate level and it is advised that IRCTC has already given the various relaxations/benefits to the service provider from time to time during COVID-19 pandemic. However, considerable increase has been observed in the foot-fall at the Railway stations and in trains as well.

W.r.t allowing operation of newly awarded unit with relaxations, it is decided that tender conditions are sacrosanct and licensee has to abide by these.”

- h) Consequently, *vide* letters dated 29.07.2021, the Appellants were asked to submit their annual licence fee and security deposit amount mentioned in their Letter of Award within a period of ten days of issuance of the letters dated 29.07.2021. The letters note that in case of non-compliance, action will be initiated as per terms and conditions of the tender, and if the Appellants do not agree with the condition, then they may opt for honourable exit from the contract. A reminder pertaining to the same was conveyed by the Respondent to the Appellants *vide* letters dated 18.08.2021, 19.08.2021, 20.08.2021 and 22.08.2021.

- i) The material on record states that *vide* letter dated 07.09.2021, M/s Sopan Restaurant requested the Respondent to allow for an honourable exist from the contract and for a refund of the security deposit of Rs. 10,22,700/- for the *janahaarat* Deen Dayal Upadhyaya railway station as well as the security deposit of Rs. 97,125/- for Refreshment Room at New Tinsukia railway station.
- j) Aggrieved by the letters issued by the Respondent directing for payment of the Annual Licence Fee, the Appellants filed a writ petition before this Court, bearing no. W.P.(C) 9179/2021. *Vide* Judgement dated 06.09.2021, the learned Single Judge has dismissed the petition and noted that no discrimination had been caused to the Petitioners. The relevant portion of the Impugned Judgement is as under:

“26. Clearly petitioners have not made out a case that petitioners are being singled out or put to prejudice vis-à-vis other tenderers or bidders in the East and West zone.

27. Petitioners have clearly participated with open eyes and submitted their bids. They now seek to resile from the same after having been found successful.

28. It is pointed out by learned counsel for the respondent that respondents had received several representations and keeping in view the specific tender condition they have decided that, as the tender conditions are sacrosanct, no relaxation from the terms and conditions of the contract/tender document is called for.

29. It is further submitted out that since the clause as contained in the Tender Documents of North and South zone is not the same as in the Tender Document of East

and West zone, similar benefit cannot be accorded to any of the tenderers. It is submitted that in view of the representations received, respondents had decided that since bidders might have misunderstood the tender condition or quoted the rates in a presumption that benefit will be extended, Respondents have decided to permit the successful bidders to honourably exit from the contract.

30. Learned counsel for the respondent submits that honourable exit would mean no coercive action would be taken against the bidder, who even after having been declared successful seeks to exit from the contract.

31. Since the petitioners had submitted their bids with open eyes and after fully appreciating the tender conditions, I am of the view that petitioners cannot claim parity with the bidders of the North and South Zone or seek alteration of a contractual term, which stands concluded by the respondents accepting the bids of the petitioners.

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34. As held hereinabove, there is no discrimination being meted out by the respondents, vis-à-vis similarly situated persons i.e. bidders of East and West zone who have participated in the tender process based on the same tender documents. Petitioners cannot claim discrimination vis-à-vis a tender document which contains different clauses.

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41. As noticed hereinabove the Tender Documents of the East and West Zone on the one side and the North and South Zone on the other contain different clauses and as such there is no question of the Petitioners seeking equality with the bidders of the North and South Zone or raise the issue of discrimination.”

k) By way of appeal against the aforementioned Judgement dated 06.09.2021, the Appellants herein have approached this Court. *Vide* Order dated 22.11.2021, this Court in C.M. Appl. 40831/2021, which sought for directions to the Respondent to maintain status quo, observed that the Appellants had made out a *prima facie* case for grant of interim relief and thereby, stayed the operation, implementation and execution of demand letters dated 29.10.2021, 01.11.2021, 10.11.2021.

3. Learned Senior Counsel appearing on behalf of the Appellants herein has vehemently argued that the conditions that have been imposed upon the Appellants in the East and West Zone with regard to full payment of licence fee are arbitrary, discriminatory and thus, contravene the tenets of equality enshrined in Article 14 of the Constitution of India. He submits that Clause 2.3.1 of the tender documents floated in the East and West Zone, and the North and South Zone are substantially different, and that no rational reasoning has been assigned as to why that is the case. She, therefore, submits , that benefits that are being accorded to contractors in the North and South Zone must be extended to East and West Zone contractors as well as everyone has been equally affected by the COVID-19 pandemic.

4. The learned Senior Counsel for the Appellants draws attention of this Court to a letter dated 29.07.2020 whereby the Respondent had agreed that the date of normalisation would be considered from the date when 100% Rajdhani Shatabadi Duroto trains and Mail Express trains would starting operating again. However, despite the existence of this circular, the Respondent demanded full licence fee from the Appellants unlike their counterparts operating in the North & South Zone. He further states that a representation made by contractors who had been awarded the contract prior

to the COVID-19 pandemic had borne fruit and had led to the Respondent cancelling the upward revision of the quoted licence fee. He argues that despite such relaxations being within the administrative domain of the Respondent, the same were not extended to the Appellants herein who were directed to strictly adhere to the clauses in their contract. He states that despite representations seeking relaxation, it was of no avail, and being small businesses which had incurred hefty losses during the pandemic, the Appellants were asked to deposit the entirety of the licence fee.

5. The learned Senior Counsel for the Appellants submits that suggestions had also been put forth by the General Manager, West Zone, IRCTC, who had highlighted the deplorable financial aftermath of the COVID-19 pandemic in the letter dated 09.08.2021, to allow for the relaxations to be extended to Appellants as well. However, all these requests fell on deaf ears of the Respondent which stated that it was not feasible to allow further relaxations. He further states that the option of Honourable Exit is a farce and that the Appellant No.2 had exited from two units at Tinsukia and DeenDayal Upadhyay Railway Stations only after increased pressure and threat of penal consequences.

6. Submissions have also been made with regard to the non-existence of the principle of intelligible differentia as per which contractors have allegedly been classified into two classes, i.e. licences awarded prior to the COVID-19 pandemic, and licences awarded post the first wave of the COVID-19 pandemic. Various Supreme Court judgements have been cited to buttress this submission. The learned Counsel for the Appellants submits that the division and differentiation is arbitrary in nature and bears no reasonable relation to the object sought to be achieved. He further submits that minimum licence fee was calculated on the basis of the rail traffic

whose unpredictability due to the pandemic has now jeopardised the business of the Appellants.

7. The learned Counsel for the Appellants submits that the learned Single Judge has failed to take into account these considerations before rendering the Order and that various crucial facts such as non-issuance of a letter of normalization have slipped through the crack. He further submits that the learned Single Judge has not appreciated the fact that footfall has reduced considerable and that the eating habits of the passengers have changed as well who now opt for e-catering or packed meals. On these grounds, a prayer has been made to allow the present appeal in favour of the Appellants herein.

8. Learned Counsel for the Respondent, submits that the Appellants had consciously partaken in the contracts awarded to them after being cognizant of the terms and conditions stipulated therein, and thus, cannot now turn around to express grievance with the same. He further submits that the learned Single Judge had rightly observed that parity could not be claimed with other contracts after having consciously participated in the tender process. He states that an option of Honourable Exit without forfeiture of security deposit and other penalties has been extended to those contractors who are facing difficulties in payment of licence fee. A letter dated 14.07.2021 issued by the Ministry of Railways has also been brought on record to categorically run home the point that no relaxation in licence fee would be given to those contracts whose tenders were finalized or price bids were submitted post 23.03.2020.

9. Learned Counsel for the Respondent submits that the West Zone had awarded three contracts to M/s Shiv and Sons, and four contracts to M/s Sopan Restaurants. Similarly, East Zone had awarded one contract to M/s

Shiv and Sons and two contracts to M/s Sopan Restaurants. He states that M/s Sopan Restaurants had honourably exited from the two contracts awarded by the East Zone. He further submits that a total number of 35 contracts had been awarded post 23.03.2020 with exit being permitted in 16 contracts, no bid being received in 7 contracts, and 2 units being put on hold due to adjudication in Court. He, thus, submits that the contracts were awarded when the Appellants were already aware of the COVID-19 pandemic.

10. The learned Counsel for the Respondent further argues that the differences in the conditions of the tender arise out of a meticulous evaluation of various factors, such as scope of work, nature of work, conditions prevalent, etc., and accordingly, every contract for every unit is distinct. Thus, the contracts for North and South Zones cannot be equalised with that of the East and West Zones. He states that the Appellants had participated in the tender after being aware of the terms and conditions, and have only sought to challenge when asked to pay the licence fee. He further states that the conditions cannot be changed solely for the Appellants as that would create an element of bias. Furthermore, the condition in itself has not been challenged and only a reduction in payment of licence fee has been sought.

11. It is further submitted that due to the COVID-19 pandemic, certain relaxations were given by various Zones as well as corporate offices to ensure smooth functioning of the Static Catering Units. However, post return to normalcy, the relaxations were reviewed by a Committee which was required to submit its recommendations. It was only after analysis of the recommendations by the Competent Authority that Zone-specific directions were passed. Further, it was also the recommendation of the Competent

Authority that no relaxation in respect of licence fee would be made with effect from 31.10.2021. The learned Counsel for the Respondent further submits that the decision dated 29.07.2020 would have no bearing on the Appellants as they had participated in the tender process in month of January and February 2021, and were completely aware of the COVID-19 aftermath, and that relaxation in payment of licence fee had been granted only to pre-COVID contractors whose scope of work had drastically changed due to the pandemic.

12. The learned Counsel for the Respondent submits that the learned Single Judge has aptly considered the situation faced by the Appellants in the East and West Zones and has arrived at the conclusion that there is no infringement of Article 14 in the current scenario as the Appellants cannot claim parity with either those who are present in the North and South Zone or with those who had bid prior to the onset of the COVID-19 pandemic. A detailed and well-reasoned judgement has been passed, and it has also been noted that instead of imposing penal consequences, the Appellants have been given the opportunity honourably exit from their obligations which has been availed in the case of two units.

13. Reliance has been placed upon a Judgement dated 23.11.2022 of a Division Bench of this Court in Kumar Infratrade Enterprises Private Limited v. Indian Railway Catering and Tourism Corporation Ltd. and Ors., W.P.(C) 15273/2022 to submit that if conditions of a tender are being enforced rigidly, then there must be strict compliance with the same. Additionally, bidders participating in a bid have no other right except the right to equality and fair treatment in the matter of evaluation of bids. Further, they have no right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of the tender

provide for such negotiations. The learned Counsel for the Respondent also cites a Judgement of the Supreme Court in N.G. Projects Limited v. Vinod Kumar Jain and Ors., **Civil Appeal No. 1846/2022** to submit that the scope of judicial intervention in such matters is extremely limited, and a Judgement dated 16.10.2020 of a Division Bench of this Court in E-Netspider India v. Union of India and Ors., **W.P.(C) 7955/2020**, to submit that a person who participates in a tender, cannot turn around and challenge the clauses of the same tender.

14. Heard learned Counsel for the Appellants and learned Counsel for the Respondent, and perused the material on record.

15. A perusal of the material on record demonstrates that a letter dated 29.07.2020 had been issued by the Respondent stating that licence fee would be collected at the existing rates only after normalization of railway services and this normalization would be considered from the date when 100% of RSD & M/E trains start operating again. Noting the increase in number of trains and passengers, *vide* letter dated 08.04.2021, the percentage of reduced licence fees for Operating Static Units (OSU) was revised from 20% to 30% of the quoted licence fee from 08.04.2021 for a period of three months. However, as the number of COVID-19 cases increased, *vide* letter dated 20.04.2021, the Respondent reviewed the upward revision of percentage of reduced licence fees and cancelled/reversed the same.

16. Material on record further demonstrates that e-tenders had been floated for maintenance and provision of catering services in/through *janahaars* and Refreshment Rooms for a period of five years. With the onset of the COVID-19 pandemic, *vide* letter dated 11.06.2021, the Respondent issued a clarification regarding submission of licence fee for ongoing tender processes and stated that there would be no relaxation of terms and

conditions for bidders who had participated in tenders awarded post 23.03.2020 and were aware of the COVID-19 pandemic. This decision was sought to be reviewed by the South Zone, North Zone and South Central Zone, and *vide* letter dated 23.07.2021, it was stated that benefits would be extended to licensees only in those cases where such clauses were incorporated in the tender documents.

17. It is the case of the Appellants that while Clause 2.3.1 of the tenders of the East and West Zones did not account of a pro-rata reduced licence fee on account of the COVID-19 pandemic, the tenders floated for the North and South Zones did. They have stated that the differentiation is arbitrary and is in the teeth of Article 14. This Court is not in agreement with the analysis and submission of the Appellants on the simple ground that parity cannot be claimed by the Appellants who are operating in the East and West Zones with those contracts that have been awarded in the North and South Zones. As has been recorded by the learned Single Judge, the Appellants were aware of the existence of the contracts awarded in the North and South Zones and they were further aware that their own tender conditions were different. It has been rightly noted by the learned Single Judge that if the Appellants were truly aggrieved, they should have challenged the tender conditions prior to bidding for the same. It is settled law that after a person has participated in the tender process with their eyes wide open, they cannot turn around and challenge the tender conditions.

18. A Judgement dated 16.10.2020 of a Division Bench of this Court in E-Netspider India v. Union of India and Anr. (supra) has relied upon a Division Bench Judgement of this Court dated 29.06.2020 in R.K. Jain and Son Hospitality Pvt. Ltd. through its Director v. Union of India and Anr., **W.P.(C) 3712/2020** to drive home the point that once the Petitioner has

participated in the tender and been awarded the same, the Petitioner would be estopped from challenging the tender conditions. The relevant portion of the said Judgement is as under:

“9. It is well settled that a person who participates in a tender, cannot turn around and challenge the clauses of the very same tender. In W.P. (C) 3712/2020 entitled R.K. Jain & Sons Hospitality Pvt. Ltd. through Its Director v. Union of India & Anr., vide judgment dated 29.06.2020, after analysing various judgments on the point, this Bench had observed as under:-

"15. The petitioner has participated in the tender process with its eyes wide open. After participating in the tender process, it is W.P. (C) No.7955/2020 Page 7 of 8 not open to the petitioner to turn around and challenge the tender conditions. In this context, a Division Bench of this Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd., reported as 2013 SCC OnLine Delhi 1982, had observed thus:-

“68. Subsequent to the issue of Addendum No. 7 on 13.07.2012 the Petitioner had raised several queries on GEC related issues which were responded to by the Respondent No. 1, however the Petitioner never communicated or expressed any doubts or apprehensions. The Petitioner had thus accepted and adhered to the tender conditions while submitting its bids. Having accepted the tender conditions and the Guaranteed Energy Consumption based evaluation by submitting its bid, the Petitioner is now estopped from challenging the tender conditions or the manner of financial bids evaluation.”

16. The captioned judgment of the Delhi High Court was upheld by the Supreme Court in Siemens

Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd. reported as (2014) 11 SCC 288. In Meerut Development Authority vs. Assn. of Management Studies reported as (2009) 6 SCC 171, the Supreme Court held as below:-

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

17. From a perusal of the above, the principle which emerges is that after having participated in the tender process, a bidder cannot turn around and challenge the tender conditions. The bidder has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested parties in response to the NIT in a transparent manner and free from any hidden agenda.” (emphasis added)”

19. Material on record indicates that a letter dated 14.07.2021 had been issued by the Ministry of Railways on the issue as to whether relief in licence fee was to be considered for those units which were allotted after the nationwide lockdown. The letter states the following:

“The issue has been examined in consultation with Finance and it is clarified that review of the license fee

as communicated vide Board's letter dated 06.06.2020 will be considered for those contracts only for which the tenders were finalised or the price bid was submitted prior to 23.03.2020 (the date of commencement of lockdown). Hence, no relief shall be considered for those contracts for which the price bid was submitted after 23.03.2020."

20. Material on record further indicates that a Committee comprising of GGM/P&T, GGM/Finance, GGM/SZ and AGM/OCS had been nominated by the Competent Authority for reviewing all dispensations that had been issued during the COVID-19 pandemic for smooth operation of Static Catering Units. The letter dated 04.10.2021 [Annexure R/2] issued by the Respondent categorically notes that "*post 23.03.2020, no relief is permissible under the price bid in terms of Railway Board letter dated 14.07.2021 and as such no clause for relief be incorporated in the tenders. The tenders which have already been finalized/letter of award issued, need not be reopened*". It further states that "*...all static units which do not accept the above conditions may be offered honourable exit without penalty but with recovery of all outstanding dues by giving six months notice up to 31.12.2021*".

21. Moreover, the letter dated 23.05.2022 [Annexure-A/2] showcases that the review of licence fee is a Zone-wise exercise which is undertaken by every Zone with the concurrence of the Associate Finance. Letter dated 08.06.2022 [Annexure-A/3] also notes that in view of the improved situation, movement of trains and passenger traffic, etc. the charging of licence fee would be restored to pre-COVID levels.

22. There is weight in the submission of the learned Counsel for the Respondent that each contract is made on the basis of a series of factors

underlying the functioning of a particular unit, and that there can be no comparison or claims of parity with other contractors belonging to different Zones. The nature of bids for the North and South Zones cannot be claimed to be similar to that of East and West Zones, and the question of equality between the two does not arise. Further, changing the terms and conditions at this juncture would cause grave prejudice to those parties who had initially participated and submitted their bids for the same tender process or those who have exited the contracts. Additionally, it is also well settled that essential clauses of a tender should be enforced strictly and that no deviation is permissible under the law [Refer to Poddar Steel Corporation v. Ganesh Engineering Works and Ors, (1991) 3 SCC 273]. The decision of the Respondent to reject the request of relaxation of licence fee was made on the basis of sacrosanct tender conditions. The Appellants cannot claim that the same was arbitrary or irrational.

23. After having analysed the facts and circumstances surrounding the matter herein, the two questions of law that arise before this Court while examining the alleged legal infirmities in the Impugned Judgement dated 06.09.2021 rendered in W.P.(C) 9179/2021 are as follows:

1. Whether the differences in Clause 2.3.1 in the North and South Zone tenders, and the East and West Zone tenders can be deemed to be classification as enshrined under Article 14 of the Constitution of India?
2. What is the scope of interference that this Court inhabits with respect to tender matters?

24. With regard to the first question of law, it would be necessary to first reproduce the concerned clauses which are allegedly arbitrary in nature. Clause 2.3.1 of the tender documents as floated in the North and South Zone, and as floated in the West and East Zone are as under:

“Clause 2.3.1 of the tender document in the East and West Zone states:

East Zone

2.3.1 Payment of LF for refreshment room

The quoted License fee for the Refreshment Room awarded to the Licensee shall be payable within 15 days from the date of issuance of LOA or as advised by competent authority of IRCTC. Thereafter, the License fee due shall be paid one month prior to the completion of the first year and likewise in subsequent years. In case of delayed payment of license fees, notice will be issued and an interest of 12% shall be charged upto the date of payment. Termination proceedings shall be initiated treating it as event of default, if the payment is not made within notice period.

West Zone

The quoted License fee for the Refreshment Room awarded to the Licensee shall be payable within 15 days from the date of issuance of LOA. Thereafter, the License fee due shall be paid one month prior to the completion of the first year and likewise in subsequent years. In case of delayed payment of license fees, notice will be issued and an interest of 12% shall be charged upto the date of payment. Termination proceedings shall be initiated treating it as event of default, if the payment is not made within notice period.”

Whereas, the tender document in North and South Zone states that:

“2.3.1 Payment of License fee for Jan Ahaar

The quoted License fee for the Jan Ahaar awarded to the Licensee shall be payable post normalization of COVID19 situation, i.e. within 07 days from the date of normalization/notice from IRCTC. Thereafter, the License fee due shall be paid one month prior to the completion of the first year and likewise in subsequent years. The unit may be operated with pro-rata reduced license fee as applicable till normalization of COVID-19 situation, duly completing the upgradation/renovation as per clause 17.1. Such period of operations shall be treated separately and not as part of the original contract.

In case of delayed payment of license fees, notice will be issued and an interest of 12% shall be charged upto the date of payment. Termination proceedings shall be initiated treating it as an event of default, if the payment is not made within notice period.”

25. The grievance of the Appellants is that while Clause 2.3.1 of the East and West Zone states that the contractors placed in these Zones have to pay full licence, the Clause 2.3.1 allows for a reduced licence fee for those situated in the North and South Zones in wake of the COVID-19 pandemic. It has been submitted by the Appellants that this is discriminatory in nature as the prevailing COVID-19 conditions are identical across the country and that the benefits of reduced licence fee should be granted to all bidders who have submitted their bids in all zones. The reasoning for this differentiation has been recorded in the Reply filed by the Respondent and has been reproduced as under:

“5. That the contents of para 8 are denied in the manner they are stated. It is vehemently denied that the respondent has arbitrarily differentiated between the tender document of North and South zones from that of East and West zones. It is submitted that the terms and conditions in various tender document are incorporated by accounting for various factors like scope of work, nature of work, conditions prevalent etc. Further, the tender committee of each tender is independent and distinct. It is the conscious call of a tender committee to prescribe terms and conditions in the tender document, which in its view would best achieve the desired objective for the unit to be tendered out, keeping in the mind the best interest of IRCTC. Therefore, these terms and conditions are unique and to be read individually for each contract. It is submitted that the appellant has participated in the said tender and submitted its bids only after going through the terms and conditions. It is only after being declared as successful bidder, the appellant in order to get its license fees reduced and also keep its license safe took the course of the present litigation. It is submitted that parties participate in the tender process only after going through the terms and condition and based on these terms and conditions place their respective bids. Therefore, once a successful bidder is selected these terms and conditions cannot be changed specially to reduce license fees as this will create a bias against the other participants. It is further pointed out as also been acknowledged by the Ld. Single Judge in judgement dated 06.09.2021 that the appellant has not challenged any of the tender conditions but has only prayed to reduce its licence fees.”

26. This Court is inclined to agree with the justification of the Respondent. Every zone functions in a distinct manner and the factors that are taken into consideration while devising the tender document for one zone cannot be utilised for devising the tender document for another zone.

Thus, the question of classification, be it reasonable or unreasonable, does not arise at all as all the zones are separate entities operating under IRCTC and are not comparable. At this juncture, it is appropriate to state that it is the author of the tender document who is deemed to be the best person to understand and appreciate its requirements. Courts should not sit like a Court of Appeal over the appropriate authority and must realise that the authority floating the tender is the best judge of its requirements [Refer to M/s Agmatel India Pvt. Ltd. v. M/s Resoursys Telecom and Ors., **2022 SCC OnLine SC 113**, and Silippi Constructions Contractors v. Union of India, **(2020) 16 SCC 489**]. In the instant case, whether or not the benefit of reduced licence fee should have been extended to the contractors in the East and West Zone is a matter of policy which cannot be delved into by this Court. Furthermore, it is only the Respondent that is the best person to discern whether certain conditions should be present in the tender document or not. The conditions have been stipulated after careful consideration of various factors and neither this Court nor the Appellant can assume equality between various Zones. Further, the Respondent was bound by its own policies as well as the directions of the Ministry of Railways.

27. It is further pertinent to note that an option of Honourable Exit had been extended to the contractors who did not wish to adhere to the conditions or were operating under the misconception of a possible reduced licence fee. The Appellants herein were fully aware of the terms and conditions, and yet chose to enter the bidding process. Even after being aware of the terms and conditions, they requested for a deviation from the same which should have invited penal consequences. However, the Respondent instead allowed them to exit with the option of not requiring to forfeit their security deposit.

28. The second question of law pertains to the scope of judicial review in contractual matters, especially those relating to tenders. It has been time and again stressed upon by the Supreme Court how the power of judicial review should not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual interests. In Shobikaa Impex Private Limited & Anr. v. Central Medical Services Society and Ors., (2016) 16 SCC 233, the Supreme Court observed the following:

19. The thrust of the matter is whether the decision by the Registration Committee by itself can be regarded as grant of registration certificate. It is luminescent that its decision to grant registration certificate is subject to conditions. Apart from that, it had not granted any certificate but only a decision was taken. There is a clear distinction between a decision taken and the decision acted upon or given effect to. Therefore, the appellant cannot claim benefit of the said decision. The appellants cannot lay stress on Clause 5.4.1 to avail the benefit of treating itself as a responsive bidder. As far as the instructions to bidders are concerned, the initial clause was that the bidder must be registered under CIB under the Act and the documentary evidence in this regard shall be submitted along with the bid. The amendment elaborating the same postulates that the registration certificate shall be submitted along with the bid at the time of opening of the tender and if it is not done, the bid shall be held as non-responsive. A submission is advanced by the first respondent that it is a clarificatory condition. As we have already opined, decision by the Registration Committee of CIB to provisionally approve registration does not amount to registration by itself with CIB. So the condition, as such, was not satisfied under the unamended stipulation. The amended clause only provides about the consequence thereof. It can be stated without any shadow of doubt that even if Clause

6 would not have been amended, the first respondent, on the ground of non-production of the registration certificate, would have been legally justified to reject the bid. It is an essential condition incorporated in the instructions to bidders. In this context, we may profitably refer to the authority in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] where a two-Judge Bench, after referring to a series of judgments has culled out the following principles: (SCC pp. 571-72, para 66)

“(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender

document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

20. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. [Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138] , it has been held that (SCC p. 148, para 15) the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

21. In Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , it has been ruled that: (SCC p. 531, para 22)

“22. ... 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.”

22. *In Union of India v. International Trading Co.* [Union of India v. International Trading Co., (2003) 5 SCC 437] , it has been held that: (SCC p. 445, para 15)

“15. ... The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose.”

It has been further opined that: (SCC p. 445, para 15)

“15. ... The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case.”

23. *In Jespar I. Slong v. State of Meghalaya* [Jespar I. Slong v. State of Meghalaya, (2004) 11 SCC 485] , this Court stated that: (SCC p. 494, para 17)

“17. ... fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable.”

29. In N.G. Projects Limitd v. Vinod Kumar Jain and Ors., (supra), while examining whether the challenge of Respondent No.1 therein to the finding of the Technical Evaluation Committee that its bid was unresponsive, the Supreme Court observed that the Courts did not have the expertise to examine the terms and conditions of the present day economic activities of the State and that any contract of public service should not be interfered with lightly.

30. What flows from the foregoing principles is that the Court's limited jurisdiction can only be exercised in cases where the conditions imposed by way of a tender document are whimsical, capricious or tailor-made to suit a particular entity or if the administrative decision taken by the Competent Authority is such that it violates the principles espoused under Article 14 of the Constitution of India, 1950. In the appeal before this Court, it must first be noted that the condition in itself has not been challenged and the challenge is to the decision of the Competent Authority to not relax the licence fee that must be deposited by the Appellants. This decision of the Competent Authority cannot be said to be discriminatory to the extent of violating the fundamental rights of the Appellants as it is based on various factors afflicting units placed in certain Zones. The Appellants have no right to claim parity with the contractors placed in different Zones whose contracts have been carefully designed to suit their situation. There is no irrationality or unreasonableness in the decision of the Respondent and the Appellants are estopped from challenging conditions of the tender or

conducting further negotiations with the tender inviting authority having once entered into the same [Refer to Meerut Development Authority v. Association of Management Studies, (2009) 6 SCC 171].

31. It appears to this Court that the learned Single Judge has correctly taken every aspect into account before dismissing the petition of the Appellants herein. Accordingly, this Court finds no infirmity in the Impugned Order dated 06.09.2021 in W.P.(C) 9179/2021 warranting the interference of this Court, and therefore, the appeal is dismissed, along with the pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

MARCH 14, 2023

Rahul/RR