

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

WPA 13366 of 2024

MRT Signals Limited and another
vs.
Union of India and others

Mr. Jayanta Kumar Mitra, Ld. Sr. Adv.
Mr. Jishnu Saha, Id. Sr. Adv.
Ms. Rajshree Kajaria,
Mr. Sarvapriya Mukherjee
Ms. Ishan Saha

... for the petitioners

Mr. S.N. Mookherjee, Ld. Sr. Adv.
Mr. Srijib Chakraborty,
Mr. Subhasis Chakraborty,
Mr. Dhruv Chadha,
Mr. Amit Chowdhury
Ms. Susmita Kumari Singh,
Mr. Aditya Mondal

... for the Respondent No.4

Mr. Debasish Kundu, Ld. Sr. Adv.
Mr. Pinaki Ranjan Chakraborty,
Ms. Susmita Sarkar

... for the Union of India

Hearing concluded on : 23.08.2024
Judgment on : 01.10.2024

Shampa Sarkar J.:-

1. The petitioner No.1 is a company incorporated under the provisions of the Companies Act 1956. The petitioner No.2 is the senior executive of the petitioner No.1. In this writ petition, the rejection of the technical bid of the petitioners on the ground that the same was found to be technically unsuitable, is under challenge.

2. The respondent No.2 published a Request For Proposal (RFP), which contained the notice inviting tender No. NCR-S&T-EPC-ABS-GMC-VGLJ dated January 19, 2024, hereinafter referred to as the 'said tender'. The description of the work was "Provision of EI based Automatic Signaling with continuous track circuiting and other Associated works including suitable indoor alterations in EI/RRI/PI stations enroute in GMC(Incl)-VGLJ (Incl) section of Jhansi Division of North Central Railway",. The said tender was in respect of an Engineering Procurement and Construction (EPC) contract. The advertised value/the estimated cost of the project was Rs.274,34,40,010.47/-.

3. The tender was for a single stage two packets system, namely, technical bid and financial bid. The last date for submission of bids was February 27, 2024 at 12.00 noon. The petitioner No.1 participated and deposited the earnest money to the tune of Rs.1,37,17,200/-. After submission of the bids, the petitioner No.1 received a letter dated March 18, 2024, from the respondent No.2, that is, the Chief Signal and Telecom Engineer-III, ALD/NCR/Subdarganj/Prayagraj, calling upon the petitioners to submit an undertaking in an enclosed format. The letter stated that an undertaking showing fulfillment of clause 2.2.2.1 (ii) of the RPF had to be filed, inter alia, stating that the petitioner No.1 had undertaken at least one eligible project of the railway sector as mentioned in clause 2.2.2.4/iii, of value not less than 35% of the estimated project cost, i.e., Rs.96,02,04,003/- and had received payment for not less than 75% of the present contract value.

4. Mr. Jayanta Mitra, learned Senior Advocate for the petitioners submitted that the said undertaking was called for in terms of the Amendment No.6 dated December 29, 2023, incorporated by the railway board in the standard terms and conditions. The terms and conditions of the RFP did not require that an undertaking in the enclosed format would have to be filed. The petitioners did not submit the purported undertaking, but explained in detail why the petitioners were not covered by the illustration. The petitioners explained that the amendment did not debar the petitioners from participating in the tender. The technical eligibility of the petitioners remained unaffected by the amendment. By the said amendment, after clause 2.2.2.1 (ii), an illustration had been introduced. The illustration applied in cases of receipt of money from prior eligible projects of the railway sector, in which there was a scope for part-payment to the contractor on procurement of goods and equipment on the basis of an indemnity bond/bank guarantee. The prior eligible railway projects in which the petitioners participated did not have a provision for part payment on procurement of goods and equipments on the basis of indemnity bond/guarantee. Thus, the petitioners received payments as a whole, in the projects they had participated.

5. According to the petitioners, clause 2.2.2.1 (ii) prescribed that the bidders should have received payment of not less than 75 % of the contract value from any prior eligible project. The newly introduced illustration by the sixth amendment did not change the purport of clause 2.2.2.1 (ii), as it stood prior to such amendment. The amendment only explained that if the prospective bidders had received payment on the basis of indemnity

bond/bank guarantee for procurement of goods and equipments from prior projects, they would have to satisfy the tendering authorities that they had received payments of not less than 75 % of the contract value for the construction work as well. In other cases where such payment mode was not prescribed by the terms of the contracts of such prior eligible projects, as in the case of the petitioners, the illustration would not be applicable.

6. Thus, it was contended by Mr. Mitra, that the railway authorities had demanded such undertaking arbitrarily, only to oust the petitioners from the bidding process. As the petitioners had not received part payment upon furnishing indemnity bond/bank guarantee, for procurement and supply of goods, the petitioners were required to satisfy the tendering authority that payment amounting to 75% payment of the present contract value had been received from a prior eligible project. The petitioners had submitted a certificate dated June 14, 2023, issued by the Deputy Chief Signal & Telecom Engineer (construction) South-Eastern Railways, Kharagpur, certifying that the petitioner had carried out work in an eligible project and received payment amounting to more than 75% of the present contract value. On the basis of such certificate, the petitioners claimed to have satisfied the condition set out in clause 2.2.2.1 (ii).

7. Such explanation was forwarded to the respondent No.2 vide reply dated April 9, 2024. Thereafter, the petitioners received an electronic mail dated May 4, 2024, at about 12.07 with the information that their bid was found to be technically unsuitable.

8. Mr. Mitra urged that such communication was in violation of the principles of natural justice. No reasons had been assigned as to why the

technical bid was found to be technically unsuitable. The e-mail was received at the registered office of the petitioners, at Kolkata. Before such rejection, an opportunity of hearing should have been given to the petitioners. Had the petitioners been given an opportunity to explain why the sixth amendment would not be applicable in their case, the authority could have understood that the undertaking would not be necessary. The cancellation on the ground of non-furnishing of such undertaking, was unfounded. The bid was cancelled on extraneous considerations and not in terms of the tender conditions. Thus, the rejection was arbitrary, irrational and unreasonable.

9. Mr. Mitra submitted that the petitioner No.1 duly furnished all necessary documents. The petitioners were singled out, only to favour the respondent No.4. To demonstrate technical capacity, eligibility and experience, the petitioner No. 1 was required to satisfy the authority that the petitioner No.1 had undertaken at least one eligible project of the railway sector as mentioned in clause 2.2.2.4/ iii of value of not less than 35 % of the estimated cost of the project and had received payment for value not less than 75 % of the project. The certificate of eligibility submitted by the petitioners was in respect of a contract, having value of Rs.98,74,31,628.32/-. Out of the contract value, for the work already carried out by the Petitioner No. 1, the Petitioner No. 1 had received Rs.74,29,14,380/- which was more than 75% of the project value. 35 % of the present contract value was Rs.96,02,04,003/-. The rejection of the technical bid dated May 4, 2024, was done in a wrongful manner, without

taking into consideration the documents which were furnished by the petitioners.

10. Mr. Mitra further submitted that the clause 2.2.2.1 (ii) should have been followed verbatim and applied in the case of the petitioners, in order to assess the technical eligibility of the petitioners. The illustration was an explanation introduced only to demonstrate what was actually expected from the bidder. Such illustration could only be applied in case of those category of bidders who had not received part payment from a prior eligible project for supply of goods and equipments on furnishing indemnity bond and bank guarantee and part payment for construction. Such illustration and the requirement to file an undertaking justifying eligibility on the basis of the illustration, were beyond the scope of the terms and conditions of the tender. The illustration could not have an overriding effect to the main condition. A bidder who fulfilled the condition, was not required to submit an undertaking demonstrating the break up of receipt of payment as per the illustration. The illustration was not a term. It was an explanation of a situation, under the term. The rejection of the technical bid also suffered from non-application of mind. As per the tender terms, to demonstrate Technical Capacity and experience, bidders were required to show that during the five previous financial years and current financial year upto the base month, they had the necessary qualifications to satisfy the criterions under two separate and independent terms of the tender, inter alia:- a) Clause 2.2.2.1(i), i.e. had received payments for construction of Eligible Projects as mentioned in Clause 2.2.2.4(i) & (ii), the sum total of which was more than 2.5 times the Estimated Project Cost; i.e.; Rs.685,86,00,026/-

(Threshold Technical Capacity). In Support of such technical capacity the bidder was required to furnish information as per Annexure II of Appendix IA. b) Clause 2.2.2.1(ii), i.e., Undertaken at least one Eligible Project of Railway Sector as mentioned in clause 2.2.2.4/iii. The value of such project should not be less than 35% of the Estimated Project Cost, i.e. Rs.96,02,04,003/- and had received payment for not less than 75% of the contract value of the present project. In support of such technical capacity the bidder was to furnish information as per Annexure IV of Appendix IA. The certificate dated 14th June 2023 at page 47 of the petition demonstrated the eligibility of the petitioner No.1 under clause 2.2.2.1 (ii).

11. According to Mr. Mitra, in order to satisfy the eligibility of the petitioner No.1 under clause 2.2.2.1(i), the petitioners submitted the contract wise payment received in the past five years in Annexure II of Appendix 1, 1A, showing receipt of Rs.788.96 crores, which was significantly more than the technical capacity threshold of the subject tender. The petitioners submitted several documents, namely, a certificate from south-eastern railway dated June 14, 2023, which showed the contract value of eligible project was Rs.98.74 crores (more than 35% of the estimated project cost) and also payment received of Rs.74.29 crores (more than 75% of the contract value of the project). Annexure IV of Appendix 1A of the bid documents showed the details of the eligible project. The eligible project relied upon by the petitioners did not have any provision for part payment on procurement of goods and equipment on the basis of indemnity bond/bank guarantee. The petitioners had received a total of Rs.74.29

crores and such payment was not referable to either any indemnity bond or a bank guarantee.

12. Mr. Mitra submitted that the only ground for cancellation as would be evident from the affidavit-in-opposition filed by the railway authorities/tendering authorities, was that the petitioner No.1 had failed to demonstrate eligibility in terms of the illustration to clause 2.2.2.1(ii) of the RFP. Such contention of the railways was on the face of record, contrary to the provisions of clause 2.2.2.1(ii). The illustration could not be pressed into service by the railways, in order to whimsically reject the bid of the petitioners, when the illustration was not applicable at all. The illustration could neither expand nor curtail the main provision. The illustration could at best be an explanation to the provisions of the main clause.

13. Mr. Mitra referred to the decisions, of ***Aniruddha Mitra vs Administrator-General of Bengal*** reported in ***AIR 1949 PC 244*** and ***Ram Gopal Sen vs Abhoya Charan Ghose and Ors.*** reported in ***AIR 1915 Cal 594*** for the proposition that an illustration could not have the effect of modifying the language of the original section of a statute. Mr. Mitra also relied on the decisions ***Union of India vs. A.L. Rallia Ram***, reported in ***AIR 1963 SC 1685*** and ***Lalit Mohan Pandey vs Pooran Singh*** reported in ***(2004) 6 SCC 626***. According to Mr. Mitra, the other contention of the railways that the petitioners had not received payment of at least Rs.27 crores from construction work was also baseless. Article 1.2(f) of the RFP defined construction to include survey, investigation, design, developing, engineering, procurement, supply of plant materials, equipment, etc. The railways tried to create a confusion by making a distinction between the

expressions 'construction' and 'procurement', in order to justify the rejection of the technical bid of the petitioners. They combined the qualifications prescribed under the illustration to clause 2.2.2.1(ii) and those under clause 2.2.2.5 of the RPF. The railways did not ever raise any dispute that the project relied upon by the petitioners was not an eligible project. Such was not the reason for rejection of the technical bid as per the averments in the affidavit-in-opposition, but a statement from the bar. The railways did not mention that the petitioners did not qualify under clause 2.2.2.1(i) of the RFP. Eligible project was defined under clause 2.2.2.4 (i) and (ii) read with clause 2.2.2.5(ii) A or B. Most importantly, the submissions of the respondent No.4 were adopted by the railways at the stage of arguments, although, the railways had never raised the question of eligibility of the project in respect of which experience was claimed to have been acquired by the petitioners.

14. With regard to the submissions of Mr. S. N. Mukherjee, learned Senior Advocate for the respondent No.4, Mr. Mitra urged that the reasons provided by the railways in respect of their decision, must be looked into by this court. The submissions of the added respondent were not relevant. The respondent No.4 did not have the authority to analyse, explain, elaborate and justify the decision of the tendering authority. The decision of the tendering authority had to be independent, based on the clauses of the RFP and not on the grounds which were beyond the terms and conditions of the RFP. The contentions of the respondent No.4 were contrary to the literal interpretation of clause 2.2.2.1(ii).

15. The respondent No.4 attempted to create a confusion by submitting that to qualify under Clause 2.2.2.1(ii), the Eligible project Undertaken by the petitioner must be one qualifying under Category 3 of Clause 2.2.2.5 of the RFP, thus making it compulsory that payment of at least Rs.27 Crores (approx.) on account of construction work should have been received by the bidder. Such was not the case run by the railways. Mr. Mitra submitted that to qualify under Clause 2.2.2.1(i), an Eligible Project of Railway Sector was as mentioned in clause 2.2.2.4/iii, which did not require qualification as per Category 3 under clause 2.2.2.5(ii)(A) or (B). Only for qualification under Clause 2.2.2.1(i), an Eligible Project should be as those mentioned in clause 2.2.2.4(i) and (ii), which expressly required further qualification under clause 2.2.2.5. The petitioner had, in fact, submitted all required forms including Annexure-II and Annexure-IV of Appendix IA. Thus, for a project to be eligible under clause 2.2.2.1(ii), clause 2.2.2.5(ii) (A) or (B) was inapplicable and accordingly the requirement of receipt of Rs. 27 crores for construction work was also inapplicable. As per clause 2.2.2.5(i) (A) or (B), the exclusion of supply of materials from the word 'construction' was confined only to such contracts which were neither construction contracts (on Turnkey basis) nor EPC contracts. The certificates produced by the petitioners were evidence of them having qualified in an eligible project and the works undertaken under different contracts cited in different certificates were all in respect of Turnkey Projects/EPC contracts. Hence, the qualifying words of clause 2.2.2.5(ii) (A) and (B) were not applicable to the petitioners at all, for fulfilling the criterion under Clause 2.2.2.1(ii).

16. The term 'construction' as defined in the contract would also include supply. The decision of the railways was *ex facie* contrary to the tender terms. The issue was not with regard to interpretation of the terms, but with regard to justification of the decision of the railways by wrongly applying those terms, which did not have a bearing on the eligibility of the bidders. The railways had arbitrarily rejected the bid on an incorrect reading of clause 2.2.2.1 (ii). The decision was taken by the authorities only to favour the respondent No.4.

17. Mr. Debashis Kundu, learned Senior Advocate appeared on behalf of the railway authorities, that is, the respondent Nos.1, 2 and 3. According to Mr. Kundu, four bidders had submitted their respective bids, including the petitioners. At a pre-bid conference, all the bidders participated. Neither any query nor any clarification was sought for by the petitioners after meaning thereby, the petitioners were well-acquainted with the clauses and terms and conditions of the RFP. The tender document had two parts. The first part was the RFP and the second part was the agreement, which was to be signed by the successful bidder and railway authorities, after selection of the bidder.

18. The interpretation of the terms and conditions in the RFP and in the agreement, were significantly different. For example, the expression 'construction' in the RFP was defined as construction and payments received on account of construction, excluding supply of equipment. Whereas, in the agreement, construction included supply. Reliance of the petitioner on the definition of construction, as provided in the agreement, was misplaced.

19. By the letter dated March 18, 2024, the railway authorities called upon the petitioners to submit an undertaking in the format attached to the letter with the project code and project name, in respect of which the petitioners were claiming fulfilment of clause 2.2.2.1 (ii) of the RFP. It was submitted by Mr. Kundu that in order to demonstrate technical capacity and experience, the bidder was required to satisfy the authorities that during the previous five financial years and in the current financial year up to the base month, the bidder had received payments for construction of eligible projects and the sum total thereof, was more than 2.5 times the estimated project cost, that is, Rs.685,86,00,026/-. Reliance was placed on clause 2.2.2.1.

20. The clause further provided that payment of one-fourth of the threshold capacity should have been received from the eligible project, either in category 1 and or category 3 specified in clause 2.2.2.4 (i) and (ii). To satisfy such eligibility, the bidder would have to also show that the bidder had undertaken one eligible project of the railway sector as mentioned in clause 2.2.2.4/iii of value of not less than 35 % of the estimated cost, that is, Rs.960,204,003/- and had received payments for not less than 75% of the present contract value, excluding payments made after adjustment of price variation of such project. The illustration only clarified the above term.

21. By a letter dated April 9, 2024, the petitioners refused to provide such undertaking on the ground that the illustration as cited under clause 2.2.2.1 (ii) was not applicable. All the other participants had submitted such undertaking, including the respondent No.4.

22. According to the railway authorities, the terms and conditions of the tender document were read as a whole. The decision of the authority was based on a composite reading of the terms and conditions of the contract and not on the basis of the illustration. First and foremost, the writ petitioners refused to submit the undertaking as was required from them under clause 2.2.2.1(ii). On the ground of non-furnishing of the undertaking, the railway authority was entitled to invoke the provisions of clause 2.6.2 of the RFP. The clause gave the right to the railways to reject any bid and bar a bidder from participating in any tender under the Union Railway, for a period of 12 months from the date of such banning. The conditions of the RFP required the petitioners to satisfy the evaluation committee of their technical capacity under Annexure II and of having participated in an eligible project. The tender document indicated that emphasis was supplied on 'construction'. The conditions that the participating bidders would have to indicate that they had received 75% payment of the present contract value solely on account of construction, and the composite amount received for both construction and supply of goods would not be taken into account to evaluate the technical capacity, were clearly spelt out in the tender document.

23. According to the railways, such requirement was incorporated in order to ensure that a successful bidder, after having supplied the goods and equipments (which could have been a major part) in the prior project, had not abandoned the project without undertaking the construction work.

24. Reliance was placed on clauses 2.2.2.1, 2.2.2.4, which dealt with the factors for evaluation and clause 2.2.2.5, which dealt with eligible

experience and eligible projects. Clause 2.2.2.6, Annexure II of Appendix 1A and Annexure IV of Appendix 1A were also relied upon to demonstrate the meaning of the expressions 'technical capacity' and 'eligible project'.

25. Referring to clause 2.2.2.5 (ii) (B), Annexure II of Appendix 1A and Annexure IV of Appendix 1A, Mr. Kundu submitted that construction did not include supply of goods. Thus, payments received in respect of constructions, were taken into consideration to evaluate the technical capacity. The writ petitioners did not fulfil the essential terms and conditions. The parameters which were part of the technical capacity were not fulfilled. The railway authorities had made an enquiry in terms of clause 2.6.1 of the RPF, into the veracity of the projects relied upon by the petitioners. The outcome of such enquiry went against the petitioners.

26. The details of such findings and the deficiencies, had been discussed in the affidavit-in-opposition. All the terms and conditions of the contract were harmoniously construed by the evaluation committee to come to a finding that the payment received by the petitioners for construction of the prior eligible project, did not reach the eligibility threshold.

27. Mr. Kundu submitted that the illustration was not the only reason for rejecting the bid of the petitioners. The authorities had come to the decision that the techno-commercial bid of the petitioners was not viable, as per their interpretation of the terms and conditions. Two bidders were found technically suitable amongst four. Thus, the question of singling out the petitioners, did not arise. Another bid was also found to be techno-commercially unsuitable.

28. The work involved public interest. Unless, the decision of the authority in cancelling the technical bid of the petitioners was adverse to public interest, the decision should not be interfered with by a writ court. The basis for rejection was that, the petitioners had not received substantial amount of payment from construction work in an eligible project. The authorities laid emphasis on the construction part of the prior experience. In terms of the various clauses of the terms and conditions of the contract, method of evaluation of the eligible project and technical capacity were justified. This was done to ensure that the selected bidder had completed major portion of the construction work in such prior eligible project and had executed the project satisfactorily. Work relating to supply of plants, machines and equipments and the income therefrom were not the primary eligibility criteria. The tendering authority was justified in laying stress on the construction aspect, as per their wisdom, knowledge and expertise.

29. Mr. Kundu relied on the following decisions:-

- a. ***Shilppi Constructions Contractors vs. Union of India & Anr.*** reported in ***(2020) 16 SCC 498***,
- b. ***N.G. Projects Limited vs. Vinod Kumar Jain.*** reported in ***(2022) 6 SCC 127***.
- c. ***Maharashtra State Electricity Distribution Company Limited vs. Ratnagiri Gas and Power Private Limited & Others*** reported in ***(2024) 1 SCC 333***.

30. Mr. S. N. Mookherji, learned Senior Advocate appeared on behalf of the respondent No.4 and submitted that the petitioners did not qualify for

various reasons. The petitioners had not undertaken at least one eligible project of the railway sector as mentioned in clause 2.2.2.4 /iii of value of not less than 35% of the estimated project cost. The petitioners had neither undertaken at least one eligible project of the railway sector nor had they received payment of not less than 75% of the present contract value, for the work of commissioning, installation etc.

31. Mr. Mookherji submitted that clause 2.2.2.4, provided the factors and categories for evaluation of the technical capacity. The subject work fell within Category 3 project, of clause 2.2.2.4. The petitioners submitted a certificate in support of their claim to have qualified the dual test as required under clause 2.2.2.1(ii) and clause 2.2.2.5(ii). The said certificate was not in respect of an eligible project. According to Mr. Mookherji, to qualify technically under RFP, the petitioners were required to satisfy other conditions. In terms of clause 2.2.2.1 (ii), the petitioners should have undertaken at least one eligible project of the railways sector, as mentioned in clause 2.2.2.4/iii of value of lot less than 35% of the estimated project cost, that is Rs.96,02,04,003/- and further, should have received payments for not less than 75% value of the present contract value.

32. In the event, the petitioners received payment for procurement of goods and equipment, the petitioners should have received not less than 75% payment of the present contract value under procurement of goods and equipment as well as not less than 75% payment of the present contract value for execution, installation and commission. In terms of clause 2.2.2.5 (ii), (B), the petitioners should have actually received cumulative payments of more than Rs.27 crores, as payment for construction work executed

during the last five years. Construction would not include supply, unless such supply was in an EPC contract.

33. As per pages 47 and 48 of the writ petition, the cost of the earlier project undertaken by the petitioners was Rs.98,74,31,628.32/-. The total cost of supply portion was Rs.81,55,281.54/- and the total cost of construction was Rs.17,19,03,473.78/-. Out of total cost of supply, the petitioners had received Rs.75,36,66,769.70/- and out of total cost of construction, the petitioners had received Rs.4,95,74,193.22/-. Thus, admittedly, the petitioners had received much less than the required payment of Rs.27 crores.

34. The petitioners admitted in their pleadings that the prior project was a GCC contract and not an EPC one. The petitioners wrongly relied on the definition of 'construction' in the agreement part, which was inapplicable. The definition of 'construction' in the RFP was taken into consideration at the time of evaluation of the bid. Clause 2.2.2.6 required the bidders to submit their technical bids as per the format at Annexure II of Appendix 1A and Annexure IV of Appendix 1A. Annexure II to Appendix 1A indicated that the bidder was required to submit details of payment for construction of eligible projects and the annexures further clarified that construction would not include supply of goods and equipments except when such supply goods and equipments did not form part of a turn-key construction/EPC contract. Further, Annexure IV of Appendix 1A, made it clear that in cases of Categories 3 and 4, payment received only in respect of construction should be provided.

35. Mr. Mookherji argued that upon reading clauses 2.2.2.1, 2.2.2.5 and Annexures II and IV of Appendix 1A, it was evident that the tender evaluating committee wanted to ensure that the bidder, who had undertaken an eligible project had received at least Rs.27,43,44,001/- from construction work. The railways reserved the right to reject the bid. The railways were within their right to invoke such provision. The interpretation of the clauses in the bid document was best left to the wisdom of the author of the document. The view taken by the tendering authority was a possible view and judicial review was not permissible.

36. The issue before this court is whether the respondent Nos.1 to 3 had acted arbitrarily in rejecting the bid of the petitioners on the ground that the bid was not technically suitable. Although, the petitioners claimed on the basis of the documents furnished by them that, the technical capacity under clause 2.2.2.1 of the Request for Proposal had been satisfied, the railway authorities and the respondent No.4 have relied on several clauses of the RFP and submitted that the petitioners did not meet the requirements under various clauses of the said RFP. The disqualification was not only on the ground of non-compliance of the illustration under clause 2.2.2.1 (ii), but for other non-compliances as well.

37. The evaluation of the technical capacity of the petitioners was done on the basis of clause 2.2.2.4 and the sub-clauses thereunder. Other clauses of the document of the RFP, including the undertakings to be given in the format provided as annexures were also considered and the petitioners were found technically ineligible. To demonstrate the eligibility under clause 2.2.2.1(i), the petitioners contended to have submitted contract-wise

payment in the previous five years vide Annexure II Appendix 1A, showing receipt of Rs.788.96 crores, which was significantly more than the threshold technical capacity. The petitioners claimed to have submitted the relevant documents and certificates.

38. To demonstrate eligibility as per clause 2.2.2.1(ii) the petitioners relied on Annexure P7 and P8 of the writ petition. The certificate issued by the Deputy Chief Signal and Telecom Engineer (Construction) South-eastern Railway, Kharagpur. The said certificate contained the information with regard to the work done by the petitioners and the same is quoted below:-

Certificate No.: S&T/Con/KGP/NSI-ROP/MRT/01

Date: 14.06.2023

TO WHOM IT MAY CONCERN

This is to certify that M/s. MRT Signals Ltd., 2, Raja Woodmount Street, Kolkata – 700001 is a working Contractor of this Unit and the following is given:-

1.	Name of work	Work for provision of New Electronics Interlocking at NEKURSENI, DANTAN, LAKSHANNATH ROAD, JALESWAR, AMARDA ROAD, BASTA and ROPSA in connection with 3 rd line between Narayangarh-Bhadrak in Kharagpur Division of South Eastern Railway. This includes provision of Double Distant Signal in the existing Signalling installation of section prior to providing new EI.
2.	LOA No. & Date	SER-CONST-HQ-S AND T/ST-CON-KGP-20-EI-NSI-ROP00827810034182 Dated 06.04.2021
3.	Contract Agreement No. & Date	S&T/CON/KGP/NSI-ROP/8-STN/20-21/07 dated 08.09.2021
4.	Contract Value at the time of award of work (Original)	Rs. 98,74,31,628.33/- (ORIGINAL)
5.	Revised Value of the Contract	Rs. 98,74,31,628.33/- (ORIGINAL)
6.	Date of Commencement	06.04.2021
7.	Original date of Completion as per Contract Agreement	05.04.2023 (24 Months from the date of issue of LOA)
8.	Total payment	Rs. 74,29,14,380/- (As on 14.06.2023)

	made to the Firm against the work as on 14.06.2023	
9.	Status of Work	1. MRT has completed and Commissioned the Double Distant work in the entire section. 2. Station NEKURSENI commissioned on 21.04.2023
10.	Remarks on performance and workmanship of the Contractor	Satisfactory

This certificate is issued on the request of the Firm M/s. MRT Signals Ltd. Kolkata

VIKAS KUMAR SINGH
Dy. Chief Signal & Telecom Engineer (Construction)
South Eastern Railway, Kharagpur

39. Annexure P8 at page 48 was relied upon by the petitioners as per clause 2.2.2.1 (ii), which is also a certificate dated June 14, 2023, issued by the Chief signal and Telecom Engineer of South-eastern Railway.

The certificate reads as follows:-

“Contract Agreement No. S&T/CON/KG/ NSI-ROP/8 -STN/20-21/07,
Dated.08/09/2021

Name of the work: "Provision of New Electronics Interlocking at NEKURSENI, DANTAN, LAKSHANNATH ROAD, JALESWAR, AMARDA ROAD, BASTA and ROPSA in connection with 3rd line between Narayangarh-Bhadrak in Kharagpur Division of South Eastern Railway. This includes provision of Double Distant Signal in the existing signalling installation of section prior to providing new El."

Name of the Contractor : M/S.M.R.T. Signals Ltd,
2,Raja Woodmunt street,
Kolkata - 700001.

Value of the Contract : Rs 98,74,31,628.33/-

Amount of total security Money : Rs. 4,93,71,581.41/-

Completion Period: 24(Twenty Four) Months i.e. up to 05/04/2023.

Estimate No. & Allocation: 4283/Sig/DPR/16/Modi/18 & CAP - 1500

(EBR IF)

Authorized Signature of Contractor

(Jai Prakash Shivaji)

Chief Signal & Telecom Engineer/Con
South Eastern Railway”

40. Relying on the above documents, the petitioners contended that the contract value of the eligible project was more than Rs.98 crores and out of the said contract value, the petitioners had received more than Rs.74 crores as payment. The advertised value of the subject tender was Rs.2,74,34,40,110/- and 35 % thereof, was Rs.96,02,04,003/-. The contract value of the prior project was more than 35% of the advertised value of the subject tender and the petitioners had received payment of more than Rs.74 crores meaning thereby, more than 75 % of the value of the project.

41. The other contention of the petitioners was that the illustration would not be applicable as the prior project executed by the petitioners were eligible projects and there was no separate mode of payment on procurement of goods and equipment on the basis of an indemnity bond or bank guarantee.

42. Reliance was placed on the payments clause of such prior project, which is quoted below:-

“No advance payment will be made by Railways to the Contractor. Payment shall be made quarterly after satisfactory completion of maintenance period of each quarter on submission of monthly audit reports/Site Register. The Measurement Book and Bills will have to be signed by Power of Attorney holders of the contractor. The power of attorney has to be submitted at the time of Measurement Book entry. In case the contractor fails to maintain (due to any reason whatsoever) no payment shall be made. However all penalty on the contractor shall continue as per the penalty clause mentioned in clause-F of Special Condition of Contract & shall be recovered even after termination of the contract and the same shall be recovered from any other bill or Security Deposit against this or other contracts and from other sources.”

43. Main thrust of the argument of Mr. Mitra, learned Senior Advocate was that the illustration could not restrict the applicability of the main

provision of clause 2.2.2.1 (ii). The petitioners had received more than 75% of the present contract value, from a prior project.

44. To counter such contention, the railways categorically explained the reasons as to why the petitioners were not found to be technically eligible. In the affidavit-in-opposition, the railways considered the documents relied upon by the petitioners, which have been quoted hereinabove, and recorded their reasons for not finding the contents of the said documents to be adequate qualification, to cross the technical capacity threshold.

45. The relevant paragraphs of the affidavit-in-opposition, in this regard are quoted below:-

“(d) the writ petitioner, in support of the tender, submitted the credentials of the two works being ;-

(A) Provision for new electronic interlocking at Nekurseni, Dantan, Lakshannath Road, Jaleswar, Rajghat, Amarda Road, Basta, Ropsa in connection with 3rd line between Narayangarh-Bhadrak in Kharagpur Division of South Eastern Railway and against the said project, the petitioner had shown receipt of Rs.78.32 crores. But on verification from petitioner's said client, it was found that out of the total cost of work being Rs.98,74,31,628.32/-, the total cost for supply portion is Rs.81,55,281.54/- and the total cost for execution/ installation/commissioning is Rs.17,19,03,473.78/-. Out of the total cost for supply, the petitioner was paid Rs.75,36,66,769.70/- being 92.41% of the total cost for supply and out of the aforesaid total cost for execution/ installation/commissioning, the petitioner was paid Rs.4,95,74,193.22/- being 28.84% of the total cost for execution/ installation/commissioning, which practically the total cost on construction work.

(B) Provisions for new electronic interlocking at Haldipada, Balasore, Nilgiri Road, Khantapara, Bahanagabazar, Soro, Sabira and Markona in connection with 3rd line between Narayangarh - Bhadrak in Kharagpur division of SouthEastern Railways. Against the said project, the petitioner had shown receipt ofRs.79.16 Crore. But on verification from the petitioner's said client it was revealed that the total cost of work in the said project is Rs. 1044038654.74/-, out of which, cost of supply portion isRs.816399486.60/- and cost for execution/ installation/ commissioning is Rs. 227639168.20/- and the petitioner received Rs. 730663729.70/- being 89.50% of the total cost for supply and received Rs.60967119,60/-, being 28.61% of the total cost for

execution/installation /commissioning, which actually the payment on construction.”

46. With regard to the work of interlocking at Nekurseni, Dantan it was found that out of the total cost for supply, the petitioners were paid Rs.75,36,66,769.70/- being 92.41% of the total cost for supply and out of the total cost for execution, installation and commissioning, the petitioners were paid Rs.4,95,74,193.22/- being 28.84% of the total cost. Thus, the total cost on construction was found to be far less than the required percentage.

47. With regard to the construction of new interlocking at Haldipara, Balasore, Nilgiri, it was revealed that the petitioners received Rs.60967119.60/- that is, 28.61% of the total cost, for execution, installation and commission. The authorities were of the view that the payment received for execution, installation and commission were practically the cost received for construction work undertaken by the petitioners in each of these projects, and the amount received was far less than the requirement under the RFP, that is, 75% value of the present contract.

48. The authorities were of the firm view that, the petitioners could not satisfy the tender evaluating authority that they had undertaken at least one eligible project of the railway sector as mentioned in the RFP, of value of not less than 35% of the estimated project cost and had received the payment of not less than 75% of the present contract value under execution, installation and commission, which was an essential requirement, specifically mentioned in the different clauses as well as the prescribed formats at

Appendix 1A and Annexures thereto. As the work was of high priority, relating to public safety, the requirement of execution of substantial construction work including survey, investigation, design, development, engineering, installation, processing, fabrication, testing and commissioning of railway projects, was an essential condition of the tender.

49. Mere supply of goods was not sufficient for selection of the bidder for the project. The relevant clauses of the RFP were to be construed as a whole, to understand the requirements of the authorities. Experience in construction had been given a primacy in all of such clauses and the railway authorities had laid great emphasis on such requirement. Further opportunity was given to the petitioners by a letter dated 18th March, 2024, to provide a breakup of the receipt of payment for supply and for construction. The petitioners neither submitted the breakup nor the undertaking, although, all the other three bidders had done so. Two bidders qualified in the technical round and two did not. The bids of the petitioners and another bidder were found to be technically not viable.

50. The fact that the petitioners did not submit the breakup and instead responded by saying that the illustration would not be applicable, is a violation of the requirements. The tendering authority was the supreme authority to decide how the clauses should be interpreted. The bidders would have to satisfy the tender evaluation committee with relevant records and documents. The tendering authority had acted within its jurisdiction to require the petitioners to furnish the undertaking and non-compliance of such instruction, could well be a ground for the authorities to disqualify the petitioners.

51. The relevant clauses of the R.F.P. relating to eligibility requirements of the bidders are extracted below:-

“2.2.2 Qualification requirements of Bidders: To be eligible for Qualification an individual Bidder or a Consortium/Joint Venture as whole as per clause 2.1.11(c), shall fulfil the following conditions of eligibility:

2.2.2.1 Technical Capacity- For demonstrating Technical Capacity and experience (the "**Technical Capacity**"), the Bidder shall, during the last 5(five) previous financial Years and the current financial year up to the Base month(not to be read with para-2.1.13).

(i) have received payments for construction of Eligible Project(s), or has undertaken construction works by itself in a PPP project, such that the sum total thereof, as further adjusted in accordance with clause 2.2.2.4 (i) & ii), is more than 2.5 (two and half) times the Estimated Project Cost i.e. Rs 685,86,00,026/- (Rs Six Eight Five Crore Eighty Six Lakhs and Twenty Six only) (the "**Threshold Technical Capacity**").

Provided that at least one fourth of the Threshold Technical Capacity shall be from the Eligible Projects in Category 1 and/ or Category 3 specified in Clause 2.2.2.4 (i) & (ii).

(ii) Undertaken at least one Eligible Project of Railway Sector as mentioned in clause 2.2.2.4/iii of value of not less than [35% (thirty five) per cent] of the Estimated Project Cost i.e. Rs 960204003/- (Rs. Ninety Six Crores Two Lakhs Four Thousand and Three only) and have received payments for not less than 75% (seventy-five) per cent value of present Contract Value(excluding the payment made for adjustment of Price variation (PVC), if any) of such project.

Illustration for received payments for not less than 75(seventy-five) percent:

For contract wherein there is provision for part payment on 'procurement of goods and equipment' on basis of **indemnity bond /Bank Guarantee**. In all such contract received payments for not less than 75(seventy-five) percent value of present Contract Value payment' means not less than 75% payment received under 'procurement of goods and equipment' as well as not less than 75% payment received under 'execution/installation/commissioning'

[Note:- For composite works of New lines, Gauge Conversion, Doubling, 3rd line, 4th line etc. with Railway electrification and/or Signalling and telecommunication works..."]

52. The work falls under category 3 project, of clause 2.2.2.4. Clause 2.2.2.4 is quoted below:-

“2.2.2.4 Categories and factors for evaluation of Technical Capacity:

Subject to the provisions of Clause 2.2.2, the following categories of experience would qualify as Technical Capacity and eligible experience (the "Eligible Experience") in relation to eligible projects as stipulated in Clauses (i) and 2.2.2.5 (ii) (the "Eligible Projects"):

Category 1: Project experience on Eligible Projects in Railways sector that qualify under Clause 2.2.2.5 (i)

Category 2: Project experience on Eligible Projects in core sector that qualify under Clause 2.2.2.5 (ii)

Category 3: Project experience on Eligible Projects in Railways sector that qualify under Clause 2.2.2.5 (ii)

Category 4: Project experience on Eligible Projects in core sector that qualify under Clause 2.2.2.5 (ii)

- (i) In case the Bidder has experience across different categories, the experience for each category would be computed as per weight of following factors to arrive at its aggregated Eligible Experience:

Category	Project experience on Eligible Projects	Factors
1	Project in Railway sector that qualify under Clause 2.2.2.5(i)	1
2	Project in core sector that qualify under Clause 2.2.2.5 (i)	0.75
3	Project in Railways sector that qualify under Clause 2.2.2.5 (ii)	1
4	Project in core sector that qualify under Clause 2.2.2.5(ii)	0.75

- (ii) The Technical capacity in respect of an Eligible Project situated in a developed country which is a member of OECD shall be further multiplied by a factor of 0.5 (zero point five) and the product thereof shall be the Technical capacity for such Eligible Project.

- (iii) For the purpose of this RFP:

- (iv) Railway & Core Sector is defined as under:

Railway & Core Sector is defined as under:

- (i) Railways sector would be deemed to include S&T work involving indoor and outdoor work like Relay based interlocking work or Electronic interlocking work or colour light signaling work or Automatic Signalling work or Intermediate Block Signalling work or Track circuiting work (using any AFTCs or any Axle Counters or DC track circuits) involving Indoor & outdoor work for Indian Railways/Metro/Suburban Transit/High Speed Railway executed as a standalone work or as part of composite work. In case of above S&T work executed in composite work only relevant S&T work shall be considered for evaluation.

- (ii) Core sector would be deemed to include Railways/Power/Telecom/ Defence/Ports/Airports/ Metro Rail/ Oil/ Gas pipeline and highways.

- (iii) The successful bidder shall submit an undertaking from RDSO approved MSDAC OEM covering supply of the equipment, installation,

testing and commissioning by the same RDSO approved source including after sales support required during the warranty period and also to confirm compliance with extant RDSO guidelines and to meet contract specific requirements before supply of equipment undertaken. The above undertaking (refer Appendix 1A Annexure-VIII) shall be submitted by bidder to Railway before supply of equipment, failing which materials will be rejected.”

53. Clause 2.2.2.1 (i) also lays emphasis on construction. The proviso is relevant in this regard. The petitioners, were required to satisfy clause 2.2.2.1 (i), 2.2.2.1 (ii), and clause 2.2.2.5 (ii) and 2.2.2.6. In terms of clause 2.2.2.1 (ii), the petitioners were required to undertake at least one eligible project of the railway sector as mentioned in clause 2.2.2.4/iii of value not less than 35% of the estimated project cost, that is, Rs.96,02,04,003/- and further should have received more payments of not less than 75% value of the present contract value. As the authorities found that the petitioners received more payment for procurement and supply and less payment for construction, and that the payment received for construction was negligible compared to the present contract value, the authority thought it fit to disqualify the petitioners, inter alia, on the ground that the payment received from construction indicated that the petitioners did not have the required technical qualification.

54. Clause 2.2.2.5 deals with eligible experience and eligible project under each category. Clause 2.2.2.5 (ii) B, which is relevant in this regard is quoted below:-

“B. For Railway electrification works: the Bidder should have received cumulative payments from its client(s) for construction works executed, fully or partially, during the last 5 (five) previous financial Years and the current financial year up to the Base month (not to be read with para-2.1.13), and only the amounts (gross) actually received, during such years shall qualify for purposes of computing the Technical Capacity. However, receipt of less than [Rs.

274344001/- (Rs. Twenty Seven Crore Forty Three Lakh Forty Four Thousand and One Only)] shall not be reckoned as receipts/execution of Eligible projects. For the avoidance of doubt, construction work shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract/EPC contract for the project.]”

55. Clause 2.2.2.6 is quoted below :-

“2.2.2.6 Submission in support of Technical Capacity

(i)The Bidder should furnish the details of Eligible Experience for the last 5 (five) previous Financial Years and the current financial year up to the Base month (not to be read with para-2.1.13).

(ii)The Bidder must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-IA.

(iii) The Bidder should furnish the required Project-specific information and evidence in support of its claim of Technical Capacity, as per format at Annex -IV of Appendix-IA.”

56. Clause 2.2.2.5 (ii) (B) required the petitioners to have actually received cumulative payments for more than Rs.27,43,44,001/-, as payments for construction work during the last five years, which did not include supply. This according to the authorities was also an essential requirement.

57. Clause 2.6 deals with the verification and disqualification clause and under clause 2.6.1, the authority reserved the right to verify the statements, information and documents submitted by the bidder. In this case, the authorities verified the documents and the break-up of the payments received in the prior projects. Upon ascertaining that the amount received for construction was much below the requirement in the present RFP, the petitioners’ bid was found to be technically unsuitable.

58. The relevant provision of clause 2.6.1 is quoted below:-

2.6 Verification and Disqualification

2.6.1 The Authority reserves the right to verify all statements, information and documents submitted by the Bidder in response to the

RFP and the Bidder shall, when so required by the Authority, make available all such information, evidence and documents as may be necessary for such verification. Any such verification or lack of such verification, by the Authority shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Authority there under.”

59. Under Clause 2.6.2 the authority reserved the right to reject any bid and bar the bidder from submission of bids in any works/ service tender issued by the Indian Railway for a period of 12 months from the date of banning, on two grounds. In this case, ground ‘b’ is relevant, which is quoted below:

“(b) the Bidder does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Bid.

Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium/Joint Venture, then the entire Consortium/Joint Venture and each member of the Consortium/Joint Venture may be disqualified/ rejected. If such disqualification/rejection occurs after the Bids have been opened and the lowest Bidder gets disqualified / rejected, then the Authority reserves the right to annul the Bidding Process and invites fresh Bids.”

60. In this case, the bidder did not provide the supplemental information sought for by the authorities, for evaluation of the bid.

61. Annexure II Appendix 1A mentions the information to be given by the bidder in support of the technical capacity. The table is set out for convenience.

“ANNEX-II
Technical Capacity of the Bidder
(Refer to Clauses 2.2.2.1, 2.2.2.4 and 2.2.2.6 of the RFP)

Bidder type #	Project Code	Category	% share	Experience (Equivalent Rs. Crore)	Technical capacity
				<u>Payments received for construction of</u>	<u>Value of self-construction Eligible</u>

				<u>Eligible Projects in Categories 3 & 4 duly multiplied by factor mentioned in clause 2.2.2.4(i)</u>		<u>projects in Categories 1 & 2 duly multiplied by factor mentioned in clause 2.2.2.4(i)</u>
(1)	(2)	(3)	(4)	(5)	(6)	(7)=4*0.5 (for OECD)/ 1 (non OECD)
Single entity Bidder Or Members of the Consortium/Joint Venture	a					
	b					
	c					
	d					
	e					
	f					
Aggregate Technical capacity=						

62. As per the Annexure II, under the column Technical Capacity, the bidder was required to mention payments received for construction of eligible projects in category 3 and 4, duly multiplied by the factor mentioned in clause 2.2.2.4(i).

63. Annexure IV, Appendix 1A is quoted below :-

Item (1)	Refer Instruction (2)	Particulars of the Project (3)
Tile & nature of the project		
Category	5	
<u>Year-wise (a) payments received for construction,</u> Or <u>(b) expenditure on construction works undertaken by itself in a PPP project.</u>	6	
Entity for which the project was constructed	7	

Location		
Project cost	8	
Date of completion/commissioning	9	
Equity shareholding (with period during which equity was held)	10	
Whether credit is being taken for the Eligible Experience of an Associate (Yes/No)	16	

64. Instructions 1, 6 and 9 to the bidders are quoted below:-

“1. Bidders are expected to provide information in respect of each Eligible Projects in this Annex. The projects cited must comply with the eligibility criteria specified in Clause 2.2.2.5 of the RFP, as the case may be. Information provided in this section is intended to serve as a backup for information provided in the Bid. Bidders should also refer to the Instructions below.

6. The total payments received and/ or expenditure incurred on construction works undertaken by itself in a PPP project are to be stated for each Eligible Project in Annex-IT of this Appendix-IA. The figures to be provided here should indicate the break-up for last 5 (five) previous Financial Years & the current financial year upto the base month (not to be read with para-2.1.13). For Categories 1 and 2, expenditure on construction of the project by the Applicant itself should be provided, but only in respect of projects having an estimated capital cost exceeding the amount specified in Clause 2.2.2.5 (i)/(c). In case of Categories 3 and 4, payments received only in respect of construction should be provided, but only if the amount received exceeds the minimum specified in Clause 2.2.2.5 (ii). Receipts for construction works should only include capital expenditure, and should not include expenditure on repairs and maintenance.

9. For Categories 1 and 2, the date of commissioning of the project, upon completion, should be indicated. In case of Categories 3 and 4, date of completion of construction should be indicated. In the case of projects under construction, the likely date of completion or commissioning, as the case may be, shall be indicated.”

65. As per instruction 6, the total payment received and/or expenditure incurred on construction work undertaken for each eligible project was to be provided. In case of categories 3 and 4, (in this case category 3), payments received only for construction work, were to be provided.

66. Instruction 9 required that in case of categories 3 and 4, date of completion of construction should be indicated. In case of projects under construction, the likely date of completion or commissioning as the case may be, should be indicated.

67. Thus, from a conjoint reading of the provisions of the RFP, which have been quoted below hereinabove, as also the provisions of the Appendix 1A and the annexures thereto, it is evident that the authorities had given importance to the experience of the bidders in construction works undertaken in the eligible project. On verifying the documents supplied by the petitioners, the authority made an enquiry and discovered that the break-up of the payments received indicated that a minuscule portion of the payment was in respect of construction work. When the petitioners were asked to explain the same by providing an undertaking, the petitioners refused to do so. Thus, the authorities decided to disqualify the petitioners upon an interpretation of the clauses and the essential conditions. The question of singling out the petitioners does not arise because another person was also found to be ineligible in the technical round.

68. In this case, the power of judicial review cannot be invoked to set aside the decision of the tendering authority on the ground that the interpretation of the clauses were either faulty or because another view was also possible. The court cannot scan the RFP with a magnifying glass to assess whether another interpretation of the terms and conditions was available. Some play in the joints should be permitted to the government in commercial matters. The court is not an appellate authority. The case of the petitioners is based on the interpretation of the clauses and this court does

not find perversity in the decision of the authorities. The authorities did not act on any extraneous considerations, but on its own interpretation of the bid document. The experts who authored the document interpreted the same as per their wisdom, understanding and requirements.

69. In ***Silppi Constructions Contractors vs. Union of India***, reported in **(2020) 16 SCC 489**, the Hon'ble Apex Court held as follows:-

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

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must

be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

70. In the decision of **Montecarlo Limited vs. National Thermal Power Corporation Limited**, reported in **(2016) 15 SCC 272**, the Hon’ble Apex Court held that the tender inviting authority was the best person to understand and appreciate its requirements. The tendering authority had the freedom to enter into contracts.

71. In **Jagdish Mandal v. State of Orissa** reported in **(2007) 14 SCC 517** the Hon’ble Apex Court held as follows:-

“22. ... 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.”

72. In **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.** reported in **(2016) 16 SCC 818**, the Hon’ble Apex Court held as follows:-

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

73. In ***National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd. and Anr.*** reported in **(2022) 6 SCC 401**, the Hon'ble Apex Court held as follows:-

“22. whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.”

74. In the matter of ***Uflex Ltd. vs Government of Tamil Nadu and Ors.*** decided in ***Civil Appeal No. 4862-4863 of 2021***, the Hon'ble Apex Court held as follows:-

“1. The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “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.

40. 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 Cellular²⁶ 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.”

75. The Hon'ble Apex Court in the matter of ***N.G. Projects Limited versus Vinod Kumar Jain and Others*** reported in **(2022) 6 SCC 127** held as follows:-

“22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived

of the infrastructure for which the present day Governments are expected to work.”

76. Under such circumstances, the writ petition is dismissed. Interim order stands vacated.

77. There will be no order as to costs.

78. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)

Later:-

Learned Advocate for the petitioner prays for stay of operation of the judgment.

The prayer is considered and rejected.

(Shampa Sarkar, J.)