(2017) 03 AP CK 0039

In the Andhra Pradesh High Court

Case No : Writ Petition No. 40315 of 2016

Baxalta Bioscience India Pvt. Ltd. APPELLANT

Vs

The State of Telangana RESPONDENT

Date of Decision : 13-03-2017

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2017) 2 ALT 798 : (2017) 3 AndhLD 352

Hon'ble Judges : Sri A. Ramalingeswara Rao, J.

Bench : Single Bench

Advocate : Senior Counsel Sri Sanjeev Puri for Sri K. Venkat Reddy, Counsel, for the Petitioner; GP for Medical & Health, Sri K.Pavan Kumar, Senior Counsel Sri Vedula Venkataramana, Sri Appaiah Sarma, Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

Sri A. Ramalingeswara Rao, J.—Heard learned Senior Counsel, Sri Sanjeev Puri for the petitioner, learned Standing Counsel for the second respondent and Sri Vedula Venkataramana, learned Senior Counsel appearing for the third respondent.

2. The undisputed facts in the present case are as follows: The second respondent invited tenders bearing No.2/TS MSIDC/Medicines/2016, dated 24.05.2016 for procurement of certain generic medicines from the interested parties. The tender was issued for procurement of 859 medicines. Though the petitioner submitted its bids for three products, in the present case, we are concerned with "Factor VIII". So far as Factor VIII is concerned, the petitioner and the third respondent submitted their bids. The tenders have to be submitted on eprocurement platform for a rate contract for the financial years 2016-17 and 2017-18. The various dates for the process of submission of bids are as follows:

Sl.

Particulars

Date and Time

1

Bid Calling

Date 24.05.2016

2

Downloading of Bid Documents

From 26.05.2016 to

04.07.2016 upto 3.00 PM

3

Pre Bid Conference Date/Time

13.06.2016 at 11:00 PM

4

Last date/Time seeking clarification

14.06.2016 05:00 PM

5

Bid Submission Closing Date/Time

05/07/16 03:30 PM

6

Bid Opening Date/Time

05.07.2016 3.30 PM

7

Last date/Time for submission of hard Copies at TS MSIDC of Office

08.07.2016 3.00 PM

8

Last date for raising objection

11/07/16 05:00 PM

3. Annexure-7 to the tender contains the check list and it is in two parts. Part-A deals with documents to be submitted online for pre-qualification and Part-B deals with documents to be submitted offline for technical evaluation. There are 27 documents which are to be submitted under Part-A out of which documents at serial numbers 4 to 18 should be submitted in original by online and documents

at serial numbers 19 to 27 should be self-attested copies bearing rubber stamp impression of firm. Apart from the above, Part-B provides for submission of original DD and all the copies of documents mentioned in serial numbers 30 to 36. The supporting documents have to be uploaded in files having size less than 1 MB. The petitioner submitted its online bid on 05.07.2016. The technical bid of the petitioner ran up to 122 pages which was broken into 18 files, less than 1 MB in size. Out of 18 documents to be uploaded, the petitioner could upload only 12 documents within the specified time, but submitted all the balance required documents through offline after the last date for submission of online bids. The valid bids, after evaluation at the prequalification stage were evaluated technically. The bid of the petitioner was also considered for technical evaluation and was rejected on 14.10.2016 for price bid evaluation on the following grounds:

"7. Baxalta Bioscience India Pvt. Ltd.

1

1687

Factor IX

Not Considered

Online documents as per Annexure-7 are mentioned as till page no.130 but, uploaded documents were only till 69 pgs. The firm has not submitted valid GMP Certificate, Market Standing Certificate, Non-Conviction Certificate and Performance Certificate

2

1367

Human Albumin 20%

Not Considered

Online documents as per Annexure-7 are mentioned as till page no.130 but, uploaded documents were only till 69 pgs. The firm has not submitted valid GMP Certificate, Market Standing Certificate, Non-Conviction Certificate and Performance Certificate

3

1802

Factor VIII

Not Considered

Online documents as per Annexure-7 are mentioned as till page no.130 but, uploaded documents were only till 69 pgs. The firm has not submitted valid GMP Certificate, Market Standing Certificate, Non-Conviction Certificate and

Performance Certificate"

Thereafter, the price bids were opened and the third respondent was found to be the successful bidder. An agreement was executed by the third respondent on 21.11.2016 and the petitioner approached this Court simultaneously. This Court, by order dated 22.11.2016, granted status quo and seeking vacation of the said order W.V.M.P. No.5198 of 2016 was filed. The said petition along with the Writ Petition is taken up for consideration.

4. Since there was a dispute with regard to the number of files uploaded and the compliance of offline documents with the online documents, this Court adjourned the matter in order to enable the second respondent to file an affidavit with regard to the documents supplied through offline. After verifying the uploaded documents and the documents submitted offline, an affidavit is filed by the second respondent stating that the petitioner has submitted all the documents required to be submitted as per Annexure 7-B. It is further stated that the deficient documents under Part A have been submitted by the petitioner by offline, but not online.

5. Learned Senior Counsel appearing for the petitioner submits that, though the petitioner could not upload the required documents online, since it supplied the balance documents within the time of verification of pre-qualifications, its bid should have been considered along with other bids, as it is a valid bid. He further submits that since the bid of the petitioner was considered for technical evaluation crossing the barrier of pre-qualification, non-consideration of the bid for price evaluation after technical evaluation is bad in law. He relied on the decisions of the Supreme Court in Poddar Steel Corporation v. Ganesh Engineering Works, (1991) 3 SCC 273, B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548, a decision of this Court in M/s. Cyano Pharma (P) Limited v. The State of Telangana, 2016 (1) ALD 760 : 2016 (2) ALT 282, and a decision of the Madras High Court in Renaatus Projects Private Limited v. The Tamil Nadu Police Housing Corporation Ltd., 2016 Supreme (Mad) 3787.

6. Learned Counsel for the second respondent as well as the learned Senior Counsel for the third respondent submit that in view of the specific condition in the tender document at para 1.2 that offline bids will not be accepted and bids submitted online and supported by offline documents will only be considered, the bid of the petitioner does not qualify for consideration and the petitioner cannot take advantage of consideration of the bid at the technical evaluation stage when the bid of the petitioner was ineligible even at the threshold. They relied on W.B. State Electricity Board v. Patel Engineering Co. Ltd(2001) 2 SCC 451, Jagdish Mandal v. State of Orissa (2007) 14 SCC 517 and Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216.

7. In the light of the above facts and submissions made by the learned Counsel appearing for the parties, the point that arises for consideration in the present case is whether the bid of the petitioner is qualified to be considered for

evaluation along with other qualified bids, though the petitioner submitted the documents through online partially and rectified the deficiency by submitting the balance documents offline.

8. The pre-bid conference was held on 13.06.2016 and the last date for seeking clarifications was indicated as 14.06.2016. As per the schedule shown above, the downloading of bid documents ended at 3:00 PM on 04.07.2016. The bids were required to be submitted by 05.07.2016 at 3:00 PM. The incomplete bid was submitted by the petitioner within time. The bids were opened at 3:30 PM on the same date. The last date for submission of hard copies was 08.07.2016. Time was granted up to 5:00 PM on 11.07.2016 for raising objections. So, by the time of opening the bids for pre-qualification, all the required documents were not uploaded by the petitioner and the deficient documents were supplied by hard copies on 06.07.2016 in the office of the second respondent. The technical evaluation of bids was done on 12.07.2016 and the petitioner submitted a representation on 25.07.2016 stating that, though all the documents were uploaded, due to some technical reason, some of the last few documents could not be attached, and hence, requested for consideration of bid for technical evaluation. The petitioner also addressed a letter through e-mail on 27.07.2016 to Vayam Technologies Ltd., the technical agency appointed for the bids, pointing out the problem in uploading the documents. The second respondent released the firm wise Preliminary Technical Bid Evaluation Report on 14.10.2016 and invited objections from the bidders giving them three days time. After receipt of the said notice, a fresh representation was made to the second respondent on 17.10.2016 stating that all the technical documents required to be submitted were duly uploaded by the petitioner on the website on 05.07.2016 and requested the second respondent to consider the bid of the petitioner. The petitioner sought reevaluation of its technical bid with the offline documents submitted by it in the interest of fair competition, fair play and public interest. The said communication was followed by another e-mail dated 11.11.2016. Another letter dated 16.11.2016 was submitted on 17.11.2016. In spite of the same, without giving any reply, when the second respondent uploaded on their website the rate contract details of 308 items on 16.11.2016, the present Writ Petition was filed on the day when the contract was entered by the second respondent with the third respondent.

9. As stated above, pursuant to the time granted by this Court, the second respondent opened the offline documents and compared them with the requirements indicated for submission of online documents and they were found to be in order when they were taken along with online documents. However, in the affidavit filed by the second respondent it is stated that pursuant to the enquiry made by the petitioner, the consultant of Vayam Technologies Ltd., sent a reply mail on 29.07.2016 to the petitioner stating that, though they have uploaded the documents in common folder, but in the bid submission process all the documents were not attached to the tender and there was no technical issue. In the affidavit it is also stated that the offline documents cannot be considered

as substitute for online documents and it would amount to doing favour to the petitioner since five other firms were also rejected on the same ground, though for other products.

10. In the first counter affidavit filed by the second respondent, it was stated that as per the purchase order dated 03.09.2016, the petitioner earlier supplied Factor VIII medicine at Rs.2999/- for each injection, whereas the third respondent agreed to supply the same now at Rs.2595/- for each injection. Thus, the price at which the petitioner was supplying the medicines was also on higher side.

11. The relevant conditions of tender read as follows:

"7.2. Pre-Qualification Bid Documents:

It shall include the following information about the firm and/or its proposal.

1.General information on the Bidder''s Company in Form P-1

2. Turn Over Details Form P-2

3. List of Major Past Supplies in Form P-3

4. Installed Production capacity for 30 Days Form P-4

5. Bank Details of the Bidder Form P-5-

7.3. Technical Bid:

It shall include all the Documents mentioned in Checklist. Annexure - 7.

7.4. Financial Bid:

The financial bid should provide cost calculations corresponding to unit price of each selected item of the schedule in the Annexure -8 provided on e-Procurement Platform.

7.5. Pre-Bid Meeting:

All the prospective bidders can participate in the Pre-Bid meeting to seek clarifications on the bid, if any. Pre-Bid meeting shall be held on Pre Bid Meeting Date at Conference Hall of O/o of Commissioner, Family Welfare, Sultan Bazar, Koti, Hyderabad. The queries can also be sent to gm.tsmsidc@gmail.com which must be received by TS MSIDC by last date and time fixed for raising queries. Queries received after due date and time, shall Not be considered.

8.1 Opening Of Bids:

Immediately after the closing time, the TS MSIDC person shall open the pre-qualification bid, and list them for further evaluation. The Technical bids of only those bidders who qualify in the pre-qualification bid will be opened. After evaluation of technical bids, the financial bids of only those bidders who qualify in technical evaluation will be opened.

10.2.2. Preliminary Examination Of Bids:

c. TS MSIDC may waive any minor informality, nonconformity or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any bidder....

10.2.3. Clarification Of Bids:

During evaluation of the bids, TS MSIDC may, at its discretion, ask the bidder, in writing, for Clarification of bid. However no change in price or substance of the bids shall be sought, offered or permitted.

10.2.5. Evaluation Of Technical Bids:

Technical bid documentation shall be evaluated in two sub-steps.

a. Firstly, the documentation furnished by the vendor will be examined prima facie to see if the offer made, technical skill base and financial capacity and other vendor attributes claimed therein are consistent with the needs of the purchaser.

b. In the second step, TS MSIDC may ask vendor(s) for additional information, visit to vendors site and/or arrange discussions with their professional, technical faculties to verify claims made in technical bid documentation."

12. In a pre-evaluation stage like this, three types of situations normally arise and the decisions of the Courts so far deal with those aspects. The tenderer may not scrupulously follow the condition of the tender or the tenderer follows the method not indicated in the tender conditions but with substantial compliance with the tender conditions or the employer, who calls for the tender, relaxes the tender conditions.

13. In respect of tender conditions, a distinction is drawn between the essential conditions and non-essential conditions. Now the law is well settled that while exercising the power of relaxation such power cannot be exercised in respect of essential conditions. But, the Courts also held that when the employer does not exercise the power of relaxation, the Courts cannot compel the employer to exercise the power of relaxation, but interfere when the employer exercises the power of relaxation in respect of non-essential conditions.

14. The distinction between the essential and non-essential conditions came up for consideration in G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488, and the same was followed in Poddar Steel Corporation''s case (supra). In the latter case when the tender of the highest bidder was accepted, the same was challenged by the unsuccessful tenderer on the ground that the necessary condition of payment of Rs.50,000/- as earnest money with the tender was not complied with. The tender conditions stipulated the deposit of earnest money by cash or Demand Draft on State Bank of India, whereas the successful tenderer enclosed the Banker''s cheque of the Union Bank of India in lieu thereof. The employer accepted the said Banker''s cheque in lieu of the stipulation mentioned in the tender conditions as substantial compliance with the condition and

awarded the work. In those circumstances, the Supreme Court held as follows:

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in G.J. Fernandez v. State of Karnataka ((1990) 2 SCC 488: AIR 1990 SC 958), a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India ((1979) 3 SCC 489), but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses the present case belongs.

7. The nature of payment by a certified cheque was considered by this Court in Sita Ram Jhunjhunwala v. Bombay Bullion Association Ltd. ((1965) 35 Com Cas 526 : AIR 1965 SC 1628) Several objections were taken there in support of the plea that the necessary condition in regard to payment was not satisfied and in that context this Court quoted the observations from the judgment in an English decision (vide Spargos case (Harmony and Montague Tin and Copper Mining Co., In re, (l873) 8 Ch A 407 : 28 LT 153) that it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards. This court applied the observations to a transaction requiring payment by one to another. The High Courts decisions in B.D.Yadav''s case (AIR 1984 Bombay 351) and TV.Subhadra Amma''s case (AIR 1982 Ker 81) are also illustrations where literal compliance of

every term of the tender notice was not insisted upon."

The Supreme Court approved B.D. Yadav and M.R.Meshram v. Administrator of City of Nagpur, AIR 1984 Bom 351 and T.V. Subhadra Amma v. Kerala Board of Revenue, AIR 1982 Ker 81 : 1981 Ker LT 444 , and accordingly, upheld the decision of the employer.

15. In B.S.N. Joshi & Sons Ltd.''s case (supra) also the tender of the successful tenderer was challenged on the ground of noncompliance with the conditions of tender. The Supreme Court noticed that the tender document was in two parts: (a) technical bid and (b) financial bid. It was also observed that nine conditions mentioned therein were required to be fulfilled by the bidders before their respective financial bids could be opened. The Supreme Court observed as follows:

"23. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor. We would, a little later, notice the underlying intention of the employer in prescribing the so called essential conditions.

....

33. Deviation, if any, therefore, was made by the competent authority of MAHAGENCO keeping in view the peculiar facts and circumstances of the case.

....

56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court''s interference in such matter should be minimal. The High Court''s jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

....

58. In Jagdish Swarup''s Constitution of India, 2nd Edition, page 286, it is stated:

"It is equally true that even in contractual matters, a public authority does not have an unfettered decision to ignore the norms recognised by the Courts, but at the same time if a decision has been taken by a public authority in a bona fide manner, although not strictly following the norms laid down by the Courts, such decision is upheld on the principle that the Courts, while judging the constitutional validity of executing decisions, must grant a certain measure of freedom of "play in the joints" to the executive.""

After observing as above, the following points were summarized:

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :

(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 of 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.

67. Law operating in the field is no long res integra. The application of law, however, would depend upon the facts and circumstances of each case. It is not in dispute before us that there are only a few concerns in India who can handle such a large quantity of coal. Transportation of coal from various collieries to the thermal power stations is essential. For the said purpose, apart from transportation job, the contractor is required to see that coal of appropriate grade is supplied. Appellant herein is in business for the last 52 years. It had been taking part in contracts involving similar jobs in various parts of India. It had all along been quoting a low rate. According to it, despite the same it has been generating profits.

68. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able discharge its contractual obligations. It must not forget the ground realities. MAHAGENCO considered all aspects of the matter while accepting appellant''s offer. In its counter affidavit, it categorically stated

that appellant would be able to perform the contractual undertaking even at such a low rate."

Thus, it is left open to the employer to exercise the power of relaxation and it is held that the duty of the Courts is to see whether such exercise of power was fair, reasonable and bona fide.

16. Learned Counsel for the petitioner placed strong reliance on M/s. Cyano Pharma (P) Limited''s case (supra), wherein the present second respondent was a respondent and the dispute arose with regard to consideration of the bids invited by it. In the said case, the petitioner submitted its bid online before the stipulated date, but in view of the doubt with regard to the submission of non-conviction certificate by online or offline, though the said certificate was submitted offline before the stipulated date, when the bid of the petitioner was rejected by the evaluation committee on the ground that non-conviction certificate was not submitted online, the Writ Petition was filed. This Court, by considering G.J.Fernandez''s case (supra), Poddar Steel Corporation''s case (supra) and Michigan Rubber (India) Limited''s case (supra) allowed the Writ Petition on the ground that no prejudice would be caused to any of the bidders whose price bid is opened and considered on competitive basis by the second respondent therein and observed as follows:

"24. The decisions relied upon by the learned senior counsel for the petitioner clearly hold that nonessential or collateral conditions of tender cannot be treated as on par with essential conditions. In the present case, in my view, the said ratio would apply, particularly, in view of the power available with the second respondent to ignore the minor deviation, minor non-conformity or irregularity, which does not constitute material deviation and such waiver would not affect the relative ranking of any bidder, as provided under clause 2(3) of Section H of the tender document, extracted above. The aforesaid conclusion, in my view, would also advance the public interest, as the second respondent would be in a position to consider the price bids offered by the petitioners in both the writ petitioners along with other successful tenderers and would be able to procure the medicines at the best possible price. Since the price bids of the petitioners are not yet opened, the same can always be opened and considered on competitive basis along with the price bids of other qualified bidders without causing any prejudice to the relative ranking of any bidder in terms of clause 2(3) of Section H, referred to above."

17. But, in this case the deficient documents were submitted offline after the stipulated date. Thus on facts, the said decision is distinguishable. The theory of prejudice has no role in deciding tender cases. The other decision relied on by the learned Counsel for the petitioner is Renaatus Projects Private Limited''s case (supra). In the said case the Writ Petitions were filed by the tenderers whose tenders were rejected on the ground that the tender document mentioned in the check list containing 32 pages was not properly uploaded by the petitioners. The Writ Petitions were allowed by taking into consideration the difference in price

quoted by the petitioners and other tenderers in the interest of the exchequer by making the following observations:

"31. In the present case, the defects pointed out by the respondent can be construed as ancillary or subsidiary condition in nature especially when it is shown that the petitioners have the wherewithal and have the capacity to undertake the contract, if awarded, by means of documentary evidence. In the present case, the violations pointed out by the respondent are trivial in nature namely non-uploading of one page of the affidavit, non-furnishing of solvency certificate after the date of tender, improper uploading of the scanned documents etc., Therefore, in my opinion, these defects cannot be and ought not to be a reason for the respondent for rejecting the tender applications of the petitioners. In such circumstances, this Court is inclined to interfere with the orders of rejection passed by the respondent.

32. The learned counsel for the respondent advanced argument that the petitioners have not challenged the tender notification itself and therefore the conditions incorporated in the tender notification will bind them. This submission cannot merit acceptance. The petitioners have no grievance over the incorporation of the conditions in the tender. They only seek a chance to rectify the trivial or minor defects committed by them and/or to clarify certain aspects with the respondent before their tender applications were rejected by the respondent. In this context, the argument of the learned counsel for the respondent that clause 13 of the tender notification only enable the respondent to seek for any clarification with the tenderers if they entertain any doubt cannot be accepted. When the respondent themselves can entertain a doubt in certain occasion which they could clarify with the tenderers, equally an opportunity has to be given to the tenderers to rectify or clarify certain aspects. As mentioned above, in this case, a pre-bid or post-bid meeting has not been convened and the tenderers have no occasion to seek for any clarification with the respondent.

33. It is well settled that in matters of contractual nature, interference of this Court will be limited unless it is shown that there is an element of arbitrariness or unfairness in the matter of processing, accepting or rejecting a tender. However, in this case, as held by the Honourable Supreme Court, when a decision has been taken by a quasi judicial authority which would affect public interest, this Court can interfere. In this case, the tender floated by the respondent involves huge amount. This Court granted interim order of status quo and when such an order was in force, the respondent opened the price bid. As the prices quoted by the other bidders were made known and/or disclosed, the petitioners have prepared a comparative statement in the form of tabulation indicating the difference in the prices offered by them and the other bidders. The tabular statement would indicate as to how much the respondent is likely to lose financially if the bid of the other bidders are accepted. Therefore, this is also one of the main reason which weighed this Court to interfere with the orders of rejection passed by this Court. The comparative statement given by the

petitioners in the respective petitions as regards the rates quoted by them and that of the other tenderers is extracted hereunder..."

Thus, the main consideration for the Court in the said case was the difference in the quoted price, but not the validity of the tender which did not comply with the conditions of tender.

18. In W.B. State Electricity Board''s case (supra) the Supreme Court categorically held that negligent mistakes in the bid documents cannot be permitted to be corrected on the basis of equity. The relevant observations made by the Supreme Court are as follows:

"24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos. 10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/ instructions is to ensure their enforcement lest the Rule of law should be a casuality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such of approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."

(emphasis supplied)

19. The said decision was followed by me in New Hyderabad Medak Transport v. State of Telangana, 2015 (5) ALT 457. The highlighted observations in the above decision clearly goes against the case of the petitioner.

20. In Jagdish Mandal''s case (supra) the Supreme Court was considering the scope of interference in contractual matters. In the said case the tender of the lowest tenderer was rejected on the ground that it was defective as not being accompanied by a valid Earnest Money Deposit. It was contended before the Supreme Court that no notice was issued before rejection and the rejection was

improper. In that context, the Supreme Court held that the judicial review should be directed to see whether choice or decision taken by the employer was ''lawful'', but not to check whether the choice or decision is ''sound''. The observations of the Supreme Court are as follows:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made ''lawfully'' and not to check whether choice or decision is ''sound''. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

21. In Michigan Rubber (India) Limited''s case (supra) the Supreme Court reiterated the above principles and further held as follows:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and nonarbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

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

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" and

(ii) Whether the public interest is affected? If the answers to the above questions are in negative, then there should be no interference under Article 226."

22. In view of the above legal position, it cannot be held that rejection of the tender for non-compliance with tender conditions is bad. Admittedly, the petitioner did not upload all the documents through online and submitted the required online documents through offline, after the last date for submission of bids. This Court cannot express any opinion in the present case regarding the position of the petitioner, had it submitted the online documents through offline before the closure of the tender. Now the law is well settled that this Court cannot sit as an appellate authority or consider the case on the grounds of equity. This Court has to examine whether the decision taken by the authority was reasonable, not arbitrary and proper. It is also on record that five tenders were rejected on the selfsame ground, though not relating to the present item of

contract. In view of the same, this Court sees no ground to interfere with the decision taken by the second respondent in rejecting the bid of the petitioner.

23. The Writ Petition is, accordingly, dismissed. The miscellaneous petitions pending in this Writ Petition, if any, shall stand closed. There shall be no order as to costs.